82-425

No. _____

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IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1982

EX PARTE STEPHEN A. McWILLIAMS

ON WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE FACTS KNOWN TO THE TRIAL COURT RAISED SUFFICIENT DOUBT AS TO McWILLIAMS' COMPETENCY TO REQUIRE THAT THE TRIAL COURT DETERMINE McWILLIAMS' COMPETENCY BEFORE HE PLED GUILTY.

II. WHETHER THE TEXAS COURT OF CRIMINAL APPEALS UNEXPECTEDLY ABANDONED TEXAS' CARVING DOCTRINE AND RETROACTIVELY AND AS AN EX POST FACTO LAW UPHELD McWILLIAMS' CONVICTION FOR THE OFFENSE OF AGGRAVATED KIDNAPPING.

PARTIES

Stephen A. McWilliams was petitioner below. The State of Texas was respondent.

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JURISDICTION

The original decision of the Texas Court of Criminal Appeals granting in part petitioner's Writ of Habeas Corpus was delivered October 15, 1980. (App. I) The Court's decision concerning the motion for rehearing by respondent was delivered May 12, 1982. (App. II) The Court's denial of petitioner's second motion for rehearing occurred on July 14, 1982. (App. IV) This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. I, § 10, cl. 1.

> No State shall . . . pass any . . . ex post facto law . . . .

U.S. CONST. amend. XIV, § 1.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the

State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE STATUTES

TEX. STAT. ANN. Code of Crim. Proc. art. 46.02 (Vernon 1979).

Sec. 2. (a) The issue of defendant's incompetency to stand trial shall be determined in advance of the trial on the merits if the court determines there is evidence to support a finding of incompetency to stand trial on its own motion or on written motion by the defendant or his counsel filed prior to the date set for trial on the merits asserting that the defendant is incompetent to stand trial.

Sec. 4. (a) If the court determines that there is evidence to support a finding of incompetency to stand trial, a jury shall be impaneled to determine the defendant's competency to stand trial. This determination shall be made by a jury that has not been selected to determine the guilt or innocence of the defendant. If the defendant is found incompetent to stand trial, a further hearing may be held to determine whether or not the defendant is mentally ill and requires observation and/or treatment or hospitalization in a mental hospital for his own welfare and protection or the protection of others or

whether he is a mentally retarded person as defined in The Mentally Retarded Persons Act (Article 3871b, Vernon's Texas Civil Statutes), and requires commitment to a mental retardation facility.

STATEMENT OF THE CASE

Alleged Crime

The State of Texas alleged that on March 21, 1975, Stephen McWilliams entered and robbed a convenience store, forced the cashier into her car, drove into the country and there compelled the cashier to engage in various sexual acts (DX 1). 1/

Record at Guilty Pleas

On July 24, 1975, McWilliams pled guilty to the offenses of aggravated robbery (Cause No. 10,169), aggravated

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1/ References are to the record as it appeared before the Texas Court of Criminal Appeals. "DX" refers to Defendant's Exhibits presented in connection with his habeas corpus petition. "SF" refers to the Statement of Facts of the habeas corpus proceeding before the District Court of Fort Bend County, Texas. "TR" refers to the transcript of the habeas corpus proceedings. DX 1 contains the Statement of Facts and State's Exhibits from McWilliams' trial at which he entered his guilty pleas.

rape (Cause No. 10,170) and aggravated kidnapping (Cause No. 10,171) in the 23rd Judicial District Court of Fort Bend County, Texas (DX 1, p. 3). During the course of receiving his guilty pleas, the Court was informed by McWilliams that he had been in two mental institutions in 1972 and had escaped from one (DX 1, pp. 6-11). On further inquiry, the Court was told that neither McWilliams nor his counsel knew the diagnoses of the psychiatrists while he was in the mental institutions (DX 1, p. 8).

The Court was thereafter presented with a two page report of a psychiatric examination by Dr. Benjamin Sher which the Court read (DX 1, pp. 13-14). Dr. Sher examined McWilliams on May 24, 1975, in the Fort Bend County Jail at the request of the District Attorney and concluded: "Although Mr. McWilliams was only selectively cooperative his psychiatric picture indicated that he is of sound mind and competent to understand

the nature of the proceedings against him and to properly assist in his own defense" (DX 1, SX 9).

Dr. Sher's report did not explain the reasons for the 1972 hospitalization, nor did Dr. Sher indicate that he had reviewed any medical records of McWilliams. Dr. Sher's report noted that McWilliams "stated that he was sent to the hospital by the court" (DX 1, SX 9). The report further stated that McWilliams "told me that he cut his wrist" (DX 1, SX 9). Finally, McWilliams "gave a long history of delinquent behavior" including receiving an Undersirable Discharge from the service. At no time did the Court inquire about the judicial commitment Dr. Sher reported, nor any suicide attempt, nor did the Court inquire into McWilliams' history of aberrant behavior. McWilliam's guilty pleas were accepted and three concurrent sentences of thirty years were imposed for aggravated

robbery, aggravated rape and aggravated kidnapping.

Record at Writ of Habeas Corpus Hearing

As the record in the subsequent Writ of Habeas Corpus proceedings now indicates, McWilliams attempted suicide on May 2, 1969 (DX 4) and on May 30, 1969 (DX 5). On January 10, 1972, McWilliams, for a third time, again attempted suicide in the jail of Schenectady, New York, while awaiting trial for robbery, larceny, attempted rape and escape (DX 6). When he attempted suicide in the New York jail, McWilliams heard voices telling him he was no good (DX 7). As a result of that incident, on January 18, 1972, the County Court of the County of Schenectady, State of New York, found that McWilliams "as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense" and entered an "Order of Commitment" to the custody of the

Commissioner of Mental Hygiene of the State of New York for one year (DX 2).

On January 19, 1972, McWilliams was admitted to the Mattewan State Hospital in New York (DX 7). The official diagnosis of the Mattewan State Hospital staff was "Psychotic Depressive Reaction; Personality Disorder, Paranoid Type; Drug Dependence, Cannabis Sativa" (DX 7). McWilliams remained in the Mattewan State Hospital until September 27, 1972, when he was transferred to the Utica State Hospital (DX 7). On October 9, 1972, McWilliams escaped from Utica (DX 7). McWilliams' final official mental diagnosis on January 22, 1973 was "Psychotic Depressive Reaction; Personality Disorder, Paranoid; Drug Dependence, Marijuana"; he was further diagnosed "Not Competent. Not Employable. Unimproved" (DX 7).

On March 22, 1975, McWilliams was arrested in Fort Bend County, Texas, and

charged with aggravated robbery, aggravated rape and aggravated kidnapping (DX 1, SX 4). On April 21, 1975, McWilliams slashed his wrists while in the Fort Bend County Jail after hearing voices telling him to kill himself (DX 8). McWilliams was treated at Ben Taub Hospital in Harris County, Texas, where the initial intake medical report described him as "chronic schizophrenic" (DX 8).

On November 18, 1979, Dr. Lucian T. Jones, a clinical psychologist, examined McWilliams in the Fort Bend County Jail. After the interview and his review of McWilliams' medical records, Dr. Jones stated that "Stephen A. McWilliams, white male, age 34, has and is experiencing a thought disorder and can be considered to have been chronically psychotic for a number of years." Dr. Jones further indicated that McWilliams was not competent at the time he entered his guilty plea on July 24, 1975 (DX 3).

Court Action on McWilliams' Writ of Habeas Corpus

In his Petition for Writ of Habeas Corpus, his First Supplemental Petition and his Second Supplemental Petition, McWilliams alleged, (a) that he was incompetent at the time of his pleas, (b) that the trial court should have conducted a competency hearing before accepting his pleas, and (c) that two of his three convictions violated the Texas carving doctrine. 2/ Pursuant to Texas law, 3/ McWilliams' claims first came before the District Court of Fort Bend County, Texas, for a hearing and findings of fact. The District Court agreed that two of the charges against McWilliams violated the carving doctrine and should be dismissed (SF 28). The District Attorney concurred (SF 28).

2/ See, Appendices VI, VII and VIII, for the exact language of McWilliams' Petitions.

3/ TEX. STAT. ANN. art. 11.07 (Vernon 1977).

The Court of Criminal Appeals in an 8-1 en banc decision dismissed McWilliams' aggravated kidnapping and rape convictions while upholding his sentence for aggravated robbery. Ex Parte Stephen McWilliams, 634 S.W.2d 815 (Tex. Crim. App. 1982). 4/ The aggravated rape charge was dismissed for reasons no longer relevant. The aggravated kidnapping charge was dismissed because it violated the Texas carving doctrine.

However, the Court found that the evidence before the Trial Court at the time McWilliams' pled guilty to robbery failed to raise "a bona fide doubt" as to his mental competence and therefore did not require a hearing.

Thereafter McWilliams filed with the Court of Criminal Appeals a motion for rehearing, reasserting his incompetence at the time of his guilty pleas and the

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4/ See Appendix I for the Court of Appeals' opinion.

Trial Court's failure to order a competency hearing. The State of Texas also sought a rehearing, arguing, inter alia, that the carving doctrine should be abandoned. In its Opinion on State's Motion for Rehearing, the Court of Criminal Appeals abandoned the carving doctrine and McWilliams' conviction for aggravated kidnapping was reinstated. Ex Parte McWilliams, 634 S.W.2d 815. 5/

McWilliams filed a second motion for rehearing, raising again the competency issues and also alleging that the Court's retroactive application of its decision to abandon the carving doctrine constituted an ex post facto law. This second motion was also denied. 6/

5/ See Appendix II, for the Court of Appeals' opinion.

6/ See Appendix IV, for notice of the denial of McWilliams' motion. See Appendix III for the opinion dissenting from denial of McWilliams' second motion.

REASONS FOR GRANTING THE WRIT

I. THE FACTS KNOWN TO THE TRIAL COURT RAISED SUFFICIENT DOUBT AS TO McWILLIAMS' COMPETENCY TO REQUIRE THAT THE TRIAL COURT DETERMINE McWILLIAMS' COMPETENCY BEFORE HE PLED GUILTY.

Before accepting McWilliams' guilty pleas, the Trial Court was made aware that McWilliams had been confined in two mental institutions a few years earlier, that his commitment to the first institution was pursuant to a judicial order, that his stay at the second institution was cut short by his escape and that McWilliams had attempted suicide. Despite this overwhelming evidence of possible incompetency, no competency hearing was instituted. 7/ Indeed, the Trial Court failed even to conduct a

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7/ Article 46.02 of the Texas Code of Criminal Procedure, which was in effect at the time of McWilliams' guilty plea, indicates that McWilliams was entitled to a competency hearing. In pertinent part Article 46.02 says:

Footnote continued on next page.

reasonably thorough interrogation of McWilliams about these indicia of incompetence.

Conviction of a person while he is legally incompetent violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Dusky v. United States, 362 U.S. 402 (1960); Bishop v. United States, 350 U.S. 961 (1956). Pursuant to this principle, this Court has declared that failure to conduct a competency hearing when a judge is aware of facts which raise reasonable doubt as to a defendant's competence is

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Footnote continued from previous page.

> Sec. 2(a). The issue of the defendant's incompetency to stand trial shall be determined in advance of the trial upon the merits if the court determines there is evidence to support a finding of incompetency to stand trial on its own motion ...
>
> Sec. 4(a). If the court determines that there is evidence to support a finding of incompetency to stand trial, a jury shall be impaneled to determine the defendant's competency to stand trial.

likewise a violation of the Due Process Clause. Pate v. Robinson, 383 U.S. 375 (1966); Drope v. Missouri, 420 U.S. 162 (1975). In Drope v. Missouri, this Court described its landmark Pate decision as follows:

> In Pate v. Robinson . . . we held that the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial.

Id. at 172 (emphasis added).

Pate and Drope are the only two Supreme Court cases which discuss the circumstances under which a trial court must on its own motion thoroughly investigate a defendant's competency to stand trial. In both those cases the Court found that further investigation should have occurred. A comparison of the facts in those cases with the facts in the present case compels the conclusion that McWilliams also was

entitled to further investigation of his competence by the Trial Court.

In Pate the evidence consisted of witnesses who recounted episodes of irrational behavior by defendant, a previous conviction of defendant for killing his son and a previous commitment of defendant by his family to a psychiatric nospital. But the hospital had declared defendant "recovered," Pate v. Robinson, 383 U.S. at 380, and a state psychiatrist had determined that defendant "knew the nature of the charges against him and was able to cooperate with counsel when he examined him two or three months before trial," Id. at 383, and during trial defendant had been alert and able to conduct intelligent conversations with the judge. Id. at 385. On these facts the Supreme Court held defendant entitled to a competency hearing. In a later case, the Court characterized its Pate holding as follows:

> [T]he Court did . . . indicate that a history of irrational behavior is a relevant factor which, on the record before it, was sufficient to require further inquiry notwithstanding Robinson's [normal] demeanor at trial and the stipulated opinion of a psychiatrist that [defendant] knew the nature of the charges against him and could cooperate with counsel when the psychiatrist examined him two or three months before.

Drope v. Missouri, 420 U.S. at 172, n. 9.

In Drope the evidence included a psychiatric report stating that defendant, "although cooperative in the examination, 'had difficulty in preparing well,' 'had a difficult time relating,' and ... 'was markedly circumstantial and irrelevant in his speech.'" The report concluded that defendant had a "borderline mental deficiency" and "chronic anxiety reaction with depression." Id. at 175-176. The court was also informed of various episodic irrational acts of defendant, and during trial defendant attempted suicide. On the other hand, the psychiatric report stated that defendant did not have "'any delusions,

illusions, [or] hallucinations. . .,' 'was well oriented in all spheres,' and 'was able, without trouble, to answer questions testing judgment.'" Id. at 175. Further, defendants' demeanor during trial was normal. On these facts the Court again held that the trial court on its own motion should have conducted a competency hearing.

Although the Trial Court in this case faced a set of facts strikingly similar to those in Pate and Drope, it failed to order a competency hearing or even to conduct a reasonably thorough interrogation of McWilliams. It did not ask McWilliams a single question about slashing his wrists. Had it pursued the matter, it might have discovered several suicide attempts, including a recent attempt in the Texas Fort Bend County Jail while McWilliams awaited trial for the very offenses for which he was attempting to plead guilty. Questioning by the Court about the most

recent suicide attempt would have revealed that McWilliams had heard voices telling him to kill himself and that after the slashing of his wrists he was taken to Ben Taub Hospital in Harris County, Texas where an initial intake report described McWilliams as "chronic schizophrenic" (DX-8).

Besides the suicide attempts, th Court also failed to question McWilliams about a prior judicial commitment to a mental institution. An adequate investigation would have shown that McWilliams' commitment was due to a determination of incompetence to stand trial in New York under circumstances almost identical to those which reoccurred in Texas. The few questions the Court did ask concerned McWilliams' treatment and diagnoses at the mental institutions where he had stayed. McWilliams reported that he had received medication and psychiatric consultation, but did not know the doctors' diagnoses (DX 1, pp. 8-9).

Finally, the Court asked no questions about the various incidents of aberrant and irrational behavior brought to the Court's attention in Dr. Sher's report.

All the above indicia of incompetency were ignored by the Trial Court. Instead, the Court and McWilliams' court-appointed counsel chose to rely entirely on the state-hired psychiatrist's two-page report, written after a brief jailhouse interview of McWilliams. (DX 1, p. 8). The report gave no explanation of McWilliams' stays at mental institutions, no details of the reported judicial commitment nor did it indicate that any of McWilliams' medical records had been reviewed - even those at nearby Ben Taub Hospital.

In Drope v. Missouri, 420 U.S. at 180, this Court stated:

> The import of our decision in Pate . . . is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to

> stand trial are all relevant in determining whether further inquiry is required [of a court], but that even one of these factors standing alone may, in some circumstances, be sufficient.

In other words, the substantial presence of just one of the three elements listed here by the Court requires a judge to conduct further reasonable inquiry. The Trial Court had abundant evidence of past medical determinations of mental illness and of irrational behavior but failed to discharge its duty of further inquiry.

When the issue of McWilliams' incompetency was presented to the Texas Court of Criminal Appeals in connection with this Writ of Habeas Corpus, the Court of Criminal Appeals failed to consider even the full range of information actually known to Trial Court which received McWilliams' guilty pleas. The Court of Criminal Appeals erroneously stated:

> In the instant case, the only matters which could have raised the question of competency at the time of trial was

> information concerning petitioner's two prior commitments at mental institutions.

Ex Parte McWilliams, Id. at 820. As is demonstrated above the psychiatrist's report, read by the Trial Court, refers to suicide attempts, a judicial commitment, and a history of aberrant behavior. This evidence "raised the question of competency." Id.

Furthermore, the Court of Criminal Appeals dismissed the evidence of McWilliams' incompetency presented in connection with the Writ of Habeas Corpus with the observation that there was "no showing that any of the evidence from the evidentiary hearing was before the trial court at the time petitioner pled guilty." Id. at 821. The answer to this off-hand treatment of the case has previously been given by this Court:

> Rather, the dispute concerns the inferences that were to be drawn from the undisputed evidence and whether, in light of what was then known, the failure to make further inquiry

> into petitioner's competence to stand trial, denied him a fair trial.

Drope at 174-175 (emphasis added). In short, the evidence developed in connection with the writ of habeas corpus established what could have been known had there been adequate inquiry.

Rather than a full inquiry into the known facts suggesting mental incompetency, the trial court merely went through the form of an inquiry. The attitude is indicated by the following colloquy at the time of McWilliams' guilty plea:

> The Court: All right, what was the diagnosis by the psychiatrist or the doctor which examined you; did they tell you?
>
> The Defendant: Various things, I don't know.
>
> Mr. Schwartz [McWilliams' counsel]: We don't really know what they said. We had him examined here, the State had him examined and said he was all right.

> The Court: Well, I've got to get these questions in the record. (DX 1, p. 8)

This case thus squarely presents this Court the opportunity to define what constitutes "adequate" procedure and sufficient "inquiry" by a trial court upon the suggestion of mental incompetency. Clearly McWilliams was not accorded "adequate" procedure or "further inquiry" into his competence; had the Court merely scratched the surface of the matters presented, McWilliams incompetency would have been manifest.

II. THE TEXAS COURT OF CRIMINAL APPEALS UNEXPECTEDLY ABANDONED TEXAS' CARVING DOCTRINE AND RETROACTIVELY AND AS AN EX POST FACTO LAW UPHELD McWILLIAM'S CONVICTION FOR THE OFFENSE OF AGGRAVATED KIDNAPPING

Prior to this case, for one hundred and five years the courts of Texas consistently construed the double jeopardy provision of the Texas Bill of Rights, art. I, § 14, as mandating the carving doctrine. See e.g., Wilson v. State, 45

Tex. 76 (1876); Herera v. State, 35 Tex. Crim. 607, 34 S.W. 943 (1896); Paschal v. State, 49 Tex. Crim. 111; 90 S.W. 878 (1905); Douthit v. State, 482 S.W.2d 155 (Tex. Crim. App. 1971). The carving doctrine prohibits prosecution for more than one offense when several offenses occur in one continuous criminal episode. See, Wilson v. State, 45 Tex. 76. As of the time of McWilliams' alleged crimes, the carving doctrine was the law of Texas.

When McWilliams alleged in his Writ of Habeas Corpus that his tripartite conviction of robbery, kidnapping and rape violated the carving doctrine, both the District Attorney of Fort Bend County, Texas (S.F. 28) and District Court agreed (S.F. 28). On appeal in an en banc 8-1 decision the Texas Court of Criminal Appeals likewise held that the carving doctrine had been violated. Ex Parte McWilliams, 634 S.W.2d 815, 817. Then, as an afterthought, the State

decided to attempt to persuade the Court of Criminal Appeals to abandon the carving doctrine. Its motion for rehearing was granted and the court bluntly declared,

> [T]he conviction for aggravated kidnapping was vacated and the indictment was ordered dismissed because the conviction. . .violated the carving doctrine. We have now re-examined the doctrine of carving and have concluded that it should be abandoned.

Id. at 822. McWilliams thereafter filed a second motion for rehearing objecting to retroactive application of the Court's decision to abandon carving. That motion was denied.

Article I, Section 10, of the Constitution of the United States forbids the enactment of ex post facto laws by the states. In Marks v. United States, 430 U.S. 188, 191 (1977), this Court stated that the principle underlying the Ex Post Facto Clause is "the notion that persons have a right to fair warning of that conduct which will give rise to

criminal penalties." So basic is that principle that this Court has found it also to inhere in the concept of due process; the right not to be subjected to a law retroactively enhancing the punishment for a crime is one of the components of the due process guarantees of the Fifth and Fourteenth Amendments. Bouie v. City of Columbia, 378 U.S. 347 (1964); Marks v. United States, 430 U.S. 188. The due process guarantee against ex post facto laws applies to judicial, as well as legislative, decisions. Bouie, Id.; Marks, Id. A judicial decision which unforeseeably alters past judicial construction of a law in a manner which expands the scope of potential criminal liability may not be retroactively applied. Bouie, Id.; Marks, Id.; United States v. Goodheim, 651 F.2d 1294 (9th Cir. 1981), reh'g denied, 664 F.2d 754 (9th Cir. 1981); Love v. Fitzharris, 460 F.2d 382 (9th Cir. 1972), vacated, 409 U.S. 1100 (1973); Foster v. Barbour, 462 F. Supp.

582 (W.D.N.C. 1978), aff'd, 613 F.2d 59 (1980).

The Texas Court's decision constituted an unforeseen alteration of past judicial construction of the Texas Constitution in a manner which expanded the scope of McWilliams' potential criminal liability. See, Bouie v. City of Columbia, 378 U.S. 347; Marks v. United States, 430 U.S. 188.

At the time McWilliams allegedly committed the crimes, the carving doctrine permitted conviction for only one offense in connection with a continuous assualt. He could thus have been convicted of robbery or kidnapping - not both. This was admitted by the State of Texas at every level until the Court of Criminal Appeals abandoned the carving doctrine in this case. Thereafter, the conviction for kidnapping was upheld. It is difficult to conceive of a clearer instance of retroactive change of a law

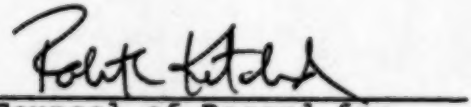
to sustain an otherwise impermissible criminal conviction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT L. KETCHAND



Counsel of Record for Petitioner

B1.13

CERTIFICATE OF SERVICE

I, Robert L. Ketchand, the attorney for the Petitioner, herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 13th day of September, 1982, served three copies of the foregoing Petition for Writ of Certiorari to Mr. Robert Huttash, State Prosecuting Attorney P.O. Box 12405, Austin, Texas 78711 and to Mr. William Meitzen, District Attorney, Fort Bend County Courthouse, Richmond, Texas 77469 by first class United States mail, certified and postage prepaid in accordance with Rule 28.3 of the Rules of the Supreme Court.

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VII. Second Supplemental Petition for Writ of Habeas Corpus.

VIII. Second Motion for Rehearing.

I. OPINION (of Oct. 15, 1980).

I. OPINION

Ex Parte Stephen McWilliams, No. 64,508 (Tex. Crim. App. Oct. 15, 1980).

This is an application for writ of habeas corpus filed pursuant to Art. 11.07, V.A.C.C.P. On July 24, 1975, petitioner entered pleas of guilty to the offenses of aggravated robbery, aggravated rape and aggravated kidnapping. Punishment in each cause was assessed at thirty years. Petitioner now raises numerous contentions concerning the validity of each of these convictions.

Initially, he maintains that his indictment for aggravated rape is fundamentally defective for failure to allege a culpable mental state. The indictment alleges in pertinent part that petitioner did then and there:

> "unlawfully, by force and threats,and without the consent of Mrs. J____ L_____, ravish and have sexual intercourse with Mrs. J____ L_____, a female not then and there the wife of the said Stephen McWilliams, and the said Stephen McWilliams did

compel submission by Mrs. J____ L_____ to said ravishment and sexual intercourse by threatening to inflict death and serious bodily injury to the said Mrs. J____ L_____."

In Ex Parte Smith, 571 S.W.2d 22, this Court held that in order to establish criminal responsibility for the offense of rape, the State must allege and prove that the defendant acted intentionally, knowingly, or recklessly. V.T.C.A. Penal Code, Sec. 6.02. When a culpable mental state is an element of an offense and the indictment fails to allege that element, the indictment is fundamentally defective and will not support a conviction. See, Zachery v. State, 552 S.W.2d 136.

We find that petitioner's indictment for aggravated rape fails to allege an offense and that the conviction based thereon is void. The relief sought as to the conviction in Cause No. 10,170 in the 23rd Judicial District Court of Fort Bend

County is granted and the indictment is ordered dismissed.

Petitioner next contends that he was subject to double jeopardy and the carving doctrine was violated when he was convicted upon the same evidence for two offenses arising out of the same continuous assaultive transaction involving a single victim.

The record reflects that on March 21, 1975, petitioner robbed at gunpoint the clerk of a grocery store in Arcola. Immediately thereafter, petitioner forced the clerk to leave the store with him in an automobile.

In two recent cases, we have held that the carving doctrine precluded convictions for both aggravated robbery and aggravated rape, where it was shown that both offenses resulted from one continuous assaultive transaction against the same victim. Orosco v. State, 590 S.W.2d 121; Ex Parte Curry, 590 S.W.2d 712. In Orosco, it was found that where

the use and exhibition of a knife provided the aggravating circumstances in both offenses, appellant could not be convicted in both. Likewise, in Phillips v. State, 597 S.W.2d 929 it was held that convictions for both aggravated kidnapping and aggravated sexual abuse resulting from one continuous assaultive transaction against the same victim violated the carving doctrine. Lastly, in Tatum v. State, 534 S.W.2d 678, it was held that convictions for three offenses arising out of a single transaction against a single victim violated the double jeopardy clauses of both the State and Federal Constitutions, and required reversal of two of the three convictions.

We find that the evidence supports the trial court's findings that one of petitioner's convictions was obtained in violation of the carving doctrine. Since the judgment in each cause was entered on the same day, we will presume that the judgment in the lowest cause number was

entered first. See, Ex Parte Calderon, 508 S.W.2d 360. The relief sought as to the conviction in Cause No. 10,171 in the 23rd Judicial District Court of Fort Bend County is granted. Petitioner's conviction for aggravated kidnapping is set aside.

The remainder of petitioner's contentions will be addressed only as they relate to his aggravated robbery conviction.

Petitioner next raises three contentions concerning his aggravated robbery indictment. He maintains that the indictment is defective because it fails to allege a culpable mental state and ownership. He further argues that the indictment is insufficient because it does not allege that the person robbed was the same person assaulted.

Petitioner's indictment for aggravated robbery alleges in pertinent part that he did then and there:

"unlawfully, and intentionally take steal, exercise control over, and carry away from Mrs. J____ L_____, hereinafter called owner, corporal personal property, to wit, money, with intent to deprive said owner of said property and without the effective consent of said owner, and said defendant, in the course of committing said theft and with intent to take, steal, obtain, and maintain control of said property, did then and there intentionally knowingly threaten and place the said owner in fear of imminent bodily injury and death by then and there using and exhibiting a deadly weapon, to wit, a fire-arm."

The allegation that petitioner acted "intentionally" is sufficient to allege a culpable mental state under Sec. 6.02, supra. There is no requirement that a robbery indictment allege ownership. Ex Parte Lucas, 574 S.W.2d 162; Servance v. State, 537 S.W.2d 753. Lastly, the victim of the robbery and the victim of the underlying theft need not be the same person. See, Watson v. State, 532 S.W.2d 619.

We find that the indictment is sufficient to allege an offense under V.T.C.A. Penal Code, Sec. 29.03.

In five related contentions, petitioner challenges the sufficency of the evidence to support his aggravated robbery conviction. This Court has repeatedly held that a habeas corpus proceeding may not be used to collaterally attack the sufficiency of the evidence to support a conviction. See, Ex Parte Dunn, 571 S.W.2d 928; Ex Parte Dantzler, 571 S.W.2d 536. These contentions are without merit. 1/

Petitioner next contends that his plea of guilty to aggravated robbery was involuntary because he was told that if he did not plead guilty, he would

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1/ The record contains a judicial confession entered at the time petitioner entered his pleas of guilty. In the confession, petitioner admits to the truth of the allegations and facts contained in the indictments. The confession is sufficient evidence to support his guilty pleas. See, Bryon v. State, 528 S.W.2d 224.

receive a life sentence. The record reflects that during the guilty plea proceeding, the trial court admonished petitioner pursuant to Art. 26.13, V.A.C.C.P. The fact that petitioner entered a plea of guilty in order to avoid a greater punishment does not entitle him to habeas corpus relief. See, Ex Parte Thomas, 474 S.W.2d 238. This contention is without merit.

Petitioner next complains of a one-on-one showup which was conducted shortly after his arrest. In Fierro v. State, 437 S.W.2d 833, it was held that a plea of guilty, if voluntarily and understandingly made, is conclusive as to the defendant's guilt and waives all non-jurisdictional defects. An error to a pretrial identification procedure does not constitute a jurisdictional defect. We find that petitioner's plea of guilty waived error, if any, in the showup conducted after his arrest.

Petitioner next contends that his plea of guilty was the result of ineffective assistance of counsel. Among other things, he maintains that his attorney coerced him into pleading guilty, refused to contact certain witnesses, and "offered no advice or legal representation."

In a post-conviction habeas corpus action, the petitioner has the burden of proof. Ex Parte Sander, 588 S.W.2d 383. An allegation of ineffective counsel will be sustained only if it is firmly founded and the record affirmatively demonstrates counsel's alleged ineffectiveness. Harrison v. State, 552 S.W.2d 151.

The trial court held an evidentiary hearing in connection with petitioner's application. At that hearing, there was no evidence offered relative to the claim of ineffective assistance of counsel. In the absence of such evidence, petitioner has failed to discharge his burden of

having the record affirmatively demonstrate the alleged ineffectiveness of counsel's representation. This contention is without merit.

Finally, petitioner attacks his aggravated robbery conviction on the basis that the trial court failed to conduct a hearing on his competency to stand trial. He maintains that there was sufficient evidence before the trial court in 1975 to raise a bona fide doubt as to his competence to stand trial and that a competency jury should have been impaneled.

In the instant case, the trial court was relieved of any responsibility to hold a pretrial hearing by virtue of petitioner's announcement of ready and entry of a guilty plea without any suggestion of incompetency. See, Morales v. State, 587 S.W.2d 418; Thomas v. State, 562 S.W.2d 240.

The record reflects that prior to accepting his pleas of guilty, petitioner

informed the court that he had been confined in two mental institutions in the State of New York. From January until September of 1972, he was at the Mattewan State Hospital in Beacon, New York. With regard to this confinement, the record from the guilty plea reflects as follows:

> "THE COURT: . . .
>
> "All right, and during the time that you were in there, did you know that you were in that place?
>
> "THE DEFENDANT: Not at the beginning.
>
> "THE COURT: What did you have, a lick on your head or a crack-up or nervous breakdown, or what happened?
>
> "THE DEFENDANT: I don't remember anything."

Petitioner was then transferred to the Utica State Hospital in Utica, New York. In describing his treatment and departure from this institution, petitioner stated as follows:

> "THE COURT: And what did they do by way of treatment or consultation?

"THE DEFENDANT: Gave me medication and saw a doctor one time.

"THE COURT: Saw a doctor one time and gave you medication?

"THE DEFENDANT: Yes.

"THE COURT: Then they released you in about a week?

"THE DEFENDANT: I left.

"THE COURT: You escaped?

"THE DEFENDANT: Yes.

"THE COURT: Ran off?

"THE DEFENDANT: Yes."

The trial court then examined a report from Dr. Benjamin Sher dated May 24, 1975. Following a request from the district attorney, Dr. Sher examined petitioner in an effort to determine his competency to stand trial. As a result of this examination, Dr. Sher concluded that petitioner was competent to stand trial. A portion of the report stated, "Mr. McWilliams stated that he spent some time in the Mattewan Hospital in Beacon, New York. He stated that he was sent to the hospital by the court."

Petitioner's trial attorney then stated that in his opinion, petitioner was competent to stand trial. The court then accepted his guilty pleas.

Art. 46.02, Sec. 2(b), V.A.C.C.P. provides as follows:

> "If during the trial evidence of the defendant's incompetency is brought to the attention of the court from any source, the court must conduct a hearing out of the presence of the jury to determine whether or not there is evidence to support a finding of incompetency to stand trial."

In Pate v. Robinson, 383 U.S. 375 (1966), the Supreme Court interpreted the due process clause to require that a criminal defendant be afforded an adequate hearing on competency to stand trial whenever the trial judge becomes aware of a bona fide doubt concerning that defendant's competence. In order to find a Pate violation, it must be shown that before or during trial, evidence of such incompetence was brought to the court's attention. See, Ex Parte Hagans, 558 S.W.2d 457.

In Ex Parte Halford, 536 S.W.2d 230, the Court found that the trial court should have conducted a competency hearing. In that case, the petitioner's mother testified that he had a long history of mental illness and irrational behavior following a head injury as a child. He was shown to have been previously committed to two mental institutions. Three doctors testified that although petitioner was a "sociopathic personality" he was nevertheless legally sane. The petitioner's trial attorney stated that petitioner's ability to communicate was "adequate." We found this evidence sufficient to raise a bona fide doubt as to competence. Ex Parte Halford, supra at 232.

Likewise, in Ex Parte Long, 564 S.W.2d 760, the petitioner maintained that the court should have conducted a competency hearing. In Long, several of the petitioner's relatives stated that

his conduct was "strange and abnormal." Two friends described him as "insane." However, three doctors testified that the petitioner was of "sound mind" at the time of trial. We found the evidence sufficient to create a bona fide doubt as to competence and that the trial court should have conducted a separate hearing to determine the issue.

Previous admission to a mental hospital coupled with an explanation does not require a separate hearing to determine competency. Cruz v. State, 530 S.W.2d 817; Bledsoe v. State, 519 S.W.2d 646. In Ainsworth v. State, 493 S.W.2d 517, no error was found in the trial court refusing to impanel a competency jury although it was discovered mid-trial that the defendant was an escapee from Rusk State Hospital. It was found that an earlier diagnosis that the defendant was mentally ill meant little when contrasted with a present evaluation by his own counsel, the trial court and a

psychiatrist on the question of present competency. Ainsworth v. State, supra at 522.

In the instant case, the only matters which could have raised the question of competency at the time of trial was information concerning petitioner's two prior commitments at mental institutions. When questioned as to the reason for his commitment, petitioner responded, "I don't remember anything." He was shown to have escaped from an institution approximately two and one-half years before the instant offenses. This evidence must be compared to Dr. Sher's examination conducted some two months before trial in which he concluded that petitioner was competent. Petitioner's testimony at the time of the guilty pleas was coherent and evidenced an understanding of the proceedings. Lastly, after observing the conduct and demeanor of petitioner at the time of trial, the court found him to be competent.

Petitioner relies extensively upon evidence introduced at the evidentiary hearing held in connection with this application to support his contention that a competency hearing should have been held at the time he pled guilty. The evidentiary hearing was held approximately four and one-half years after trial.

The record from the evidentiary hearing reveals four previous suicide attempts by petitioner. It was further shown that at the time petitioner was committed to Mattewan Hospital, he had been charged with multiple criminal offenses in New York and that the County Court of Schenectady County found that "as a result of mental disease or defect [he] (petitioner) lacks capacity to understand the proceedings against him or to assist in his own defense." There is no showing that this determination has ever been set aside. Upon his transfer to Utica Hospital, petitioner's diagnosis

was as follows: "psychotic depressive reation; personality disorder; paranoid, and drug dependence." Following his escape from Utica, his condition was stated as "unimproved." Following his arrest for the instant offenses in Fort Bend County, petitioner was described as a "chronic schizophrenic." Lastly, in an affidavit dated January 17, 1980, Lucian Jones, a clinical psychologist, states that upon the basis of this examination, he is of the opinion that petitioner was incompetent at the time he pled guilty in 1975.

There is no showing that any of the evidence from the evidentiary hearing was before the trial court at the time petitioner pled guilty. In the absence of such a showing, the matters before the court at the time of the guilty plea was insufficient to raise a bona fide doubt a as to competency to stand trial. Under such circumstances, there was no error in

the trial court failing sua sponte to conduct a competency hearing. 2/

The relief sought as to the conviction in Cause No. 10,169 in the 23rd Judicial District Court of Fort Bend County is denied. The relief sought as to the conviction in Cause No. 10,170 is granted and the indictment is ordered dismissed. The relief sought in Cause No. 10,171 is granted and the conviction is set aside and prosecution ordered dismissed.

It is so ordered.

TOM G. DAVIS, Judge

(Delivered October 15, 1980)

EN BANC

2/ Petitioner does not contend that he was in fact incompetent at the time of trial. Rather, his contention solely centers around the failure to provide a competency hearing. Cf. Zapata v. Estelle, 588 F.2d 1017 (5th Cir. 1979); Nathaniel v. Estelle, 493 F.2d 794 (5th Cir. 1974).

NO. 64,508

EX PARTE - - - Habeas Corpus Application
From Fort Bend County
STEPHEN A. McWilliams

DISSENTING OPINION

The majority grants the relief in the aggravated rape case because of the omission in the indictment of a culpable mental state. The cupable mental states are that one intentionally, knowingly, recklessly or negligently commit the act constituting a crime. It is inconceivable that one can, by threats to take a life, compel a woman to submit to intercourse by recklessness or negligence. Is it conceivable that one can threaten to inflict serious bodily injury or death to compel a woman to submit to intercourse without knowing it?

The indictment reads that petitioner did

> ". . . unlawfully, by force and threats, and without the consent of Mrs. J____ L____, ravish and have sexual intercourse with Mrs. J____ L____, a female not then and there the

wife of the said Stephen McWilliams, and the said Stephen McWilliams did compel submission by Mrs. J____ L____ to said ravishment and sexual intercourse by threatening to inflict death and serious bodily injury to the said Mrs. J_____ L_____."

V.T.C.A., Penal Code, Section 21.02, sets forth the elements of rape:

"(a) A person commits an offense if he has sexual intercourse with a female not his wife without the female's consent.

"(b) The intercourse is without the female's consent under one or more of the following circumstances:

"(1) he compels her to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances;

"(2) he compels her to submit or participate by any threat, communicated by actions, words, or deeds, that would prevent resistance by a woman of ordinary resolution, under the same or similar circumstances, because of a reasonable fear of harm; . . ."

V.T.C.A., Penal Code, Section 21.03, sets forth the aggravating circumstances of rape:

> "(a) A person commits an offense if he commits rape as defined in Section 21.02 of this code or rape of a child as defined in Section 21.09 of this code and he:
>
> " * * *
>
> "(2) compels submission to the rape by threat of death, serious bodily injury, or kidnapping to be imminently inflicted on anyone."

In Childs v. State, 547 S.W.2d 613 (Tex.Cr.App. 1977), the defendant contended that the indictment failed to allege to whom the threat of death was communicated and was, thus, fundamentally defective. We held that a "logical deduction arising from a reasonable reading of the entire indictment is that the prosecutrix submitted to appellant's act because he threatened her with the imminent infliction of death." 547 S.W.2d at 615.

In Clark v. State, 527 S.W.2d 292 (Tex.Cr.App. 1975), we held that the indictment, read as a whole, was sufficient to apprise the defendant of the offense under the statute. See also Banks v. State, 530 S.W.2d 940 (Tex.Cr.App. 1976).

Article 21.17, V.A.C.C.P., provides:

> "Words used in a statute to define an offense need not be strictly pursued in the indictment; it is sufficient to use other words conveying the same meaning, or which include the sense of the statutory words."

When the indictment in the present case is read as a whole, it is clear that McWilliams is charged with aggravated rape. It is incomprehensible that someone can threaten to inflict death and serious bodily injury on another and by force and threats have sexual intercourse with the complainant and not know about it or intend to do it. We should look at the indictment, absent a motion to quash, only to see if it sufficiently charges an offense against the State.

The majority grants relief in the aggravated kidnapping conviction. The relief should not be granted in aggravated robbery convictions for the reasons set forth in the dissenting opinion in Orosco v. State, 590 S.W.2d 121 (Tex.Cr.App. 1980).

Douglas, Judge

(Delivered October 15, 1980)
En Banc

B1.12

II. OPINION ON STATE'S MOTION FOR REHEARING

II. OPINION ON STATE'S MOTION FOR REHEARING

Ex Parte Stephen McWilliams, No. 64,508 (Tex. Crim. App. May 12, 1982).

The petitioner in this post-conviction habeas corpus proceeding, Art. 11.07, V.A.C.C.P., seeks relief under the carving doctrine. We now abandon the carving doctrine for the compelling reason that it encourages crime. When the carving doctrine may be applied to a situation in which a defendant robs, kidnaps, rapes, and murders his victim, the defendant suffers no more punishment that he would had he committed only one of the crimes. Justice and reason demand prosecution for each of the separate offenses so that a robber will be detered from kidnapping, raping, and murdering the victim.

The petitioner was convicted of the offenses of aggravated kidnapping, V.T.C.A. Penal Code, Sec. 20.04, aggravated robbery, V.T.C.A. Penal Code, Sec. 29.03, and aggravated rape, V.T.C.A.

Penal Code, Sec. 21.03. These offenses were committed in the same criminal episode or transaction.

On original submission, the conviction for aggravated rape was vacated and the indictment ordered dismissed because the indictment was found to be fundamentally defective. We will give no further consideration to that matter which was correctly decided on original submission. The conviction for aggravated robbery was upheld, but the conviction for aggravated kidnapping was vacated and the indictment was ordered dismissed because the conviction for kidnapping violated the carving doctrine. We have now re-examined the doctrine of carving and have concluded that it should be abandoned. Although many opinions of this Court have stated that the carving doctrine is mandated by the Double Jeopardy Clauses of the Constitution of the United States and the Constitution of this State, these opinions are incorrect;

the doctrine of carving is not mandated by the Double Jeopardy Clauses.

The dissenters agree that the doctrine of carving is not based in any constitutional or statutory provision; it is based only on tradition -- it seemed unfair to prosecute a bailee for stealing both the horse and the saddle. Quitzow v. State, 1 Tex.App. 47 (Ct.App. 1976). The dissenters urge that a prosecutor should be allowed only to take his "best shot" and obtain one conviction when a defendant robs, kidnaps, rapes, and murders his victim. However, since the carving doctrine is not supported by constitutional or statutory provisions, and since this tradition, the doctrine of carving, has now proved unsound, it should be abandoned.

There is no definitive statement of the carving doctrine; it is a nebulous rule applied only in this jurisdiction. Initially, carving was applied when the two offenses charged contained common

material elements or when the two offenses required the same evidence to convict. Herrera v. State, 35 Tex.Cr.R. 607, 34 S.W. 943 (1896). This Court added the "continuous act or transaction" test in Paschal v. State, 49 Tex.Cr.R. 111, 90 S.W. 878 (1905). Since that time the "same evidence" and the "continuous assaultive transaction" tests have been randomly applied. In Duckett v. State, 454 S.W.2d 755 (Tex.Cr.App. 1970) defendant's robbery conviction was held to be in violation of the carving doctrine because the same evidence was used to support both that conviction and defendant's conviction of assault with intent to murder. Then, in Douthit v. State, 482 S.W.2d 155 (Tex.Cr.App. 1972) the court used the continuous assaultive transaction test to determine whether defendant's two prosecutions for rape (of the same victim) were in violation of the carving doctrine. The court held that the various acts of intercourse, although

all part of a continuous assaultive transaction, were sufficiently separated by time and place so that they were not part of a single transaction for carving purposes. The court returned to the "same evidence" test in Robinson v. State, 530 S.W.2d 592 (Tex.Cr.App. 1975) to uphold defendant's convictions of criminal trespass and misdemeanor theft. Significantly, under a "same transaction" analysis, the carving doctrine would have disallowed the second conviction since the theft was committed upon defendant's trespass onto the University of Houston campus.

That different decisions can be supported by these two theories indicates the lack of precedential value of the carving doctrine decisions. In some cases this Court cites both the Herrera "same evidence test" and the Paschal "continuous assaultive transaction" test. See Duckett v. State, supra, and Hawkins v. State, 535 S.W.2d 359 (Tex.Cr.App.

1976). Neither of these two tests is without scholarly criticism. See Steele, A Review of the Jeopardy Defense in Texas, 16 Tex Tech. Law Review, 393 (1981); Kirchheimer, The Act, the Offense, and Double Jeopardy, 58 Yale L.J. 503 (1949); Twice in Jeopardy, 75 Yale L.J. 262 (1965).

Neither the Federal nor State Constitutions nor Texas statutes prohibit multiple prosecution for two statutory offenses committed in the same transaction. The constitutional provisions speak of double jeopardy in terms of the "same offense" rather than "same transaction." The Supreme Court of the United States in Sanabria v. United States, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978) stated that the power to define offenses lies in the legislature:

> "[O]nce Congress has defined a statutory offense by its prescription of the 'allowable unit of prosecution' that prescription determines the scope of protection afforded by a prior conviction acquittal."

This deference which the Supreme Court has shown to the United States Congress should also be shown by this Court to the Texas Legislature. Not only has the legislature clearly defined and separated criminal offenses; it has also made known, directly and indirectly, its intent insofar as multiple prosecutions are concerned. In Chapter 3 of the Texas Penal Code (1974) multiple prosecutions of property offenses are considered. It appears the legislature intended to exclude other offenses from this provision, and to allow prosecutions for each offense occurring within one criminal transaction. 1/ Prosecutions for each offense, other than property offenses occurring in one criminal transaction are to be prohibited only when in

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1/ Compare Chapter 3, Multiple Prosecutions and Double Jeopardy, Texas Penal Code, A Proposed Revision, State Bar Committee on Revision of the Penal Code, Final Draft (October 1970) with Chapter 3, Multiple Prosecutions, V.T.C.A. Penal Code (1974).

violation of the double jeopardy clauses of the Federal and State Constitutions.

The difficulties involved in the application of the carving doctrine are numerous. Any sequence of conduct can be labelled a "transaction" and this Court has construed the term in an inconsistent manner. Many cases decided under the carving doctrine are in conflict. In one case the court upheld defendant's three convictions of sodomy with the same person on the same occasion, Lee v. State, 505 S.W.2d 816 (Tex.Cr.App. 1974); in another case the court reversed two of defendant's three convictions for indecent exposure, fondling, and statutory rape, also involving and same person on one occasion. Ex parte Calderon S.W.2d 360 (Tex.Cr.App. 1974). The court reasoned that in the first case each offense was separate, but in the second case, it held that even though the offenses are separate under the law, they nontheless were a single transaction

because they were proved by the same acts. Id. Successive prosecutions for aggravated robbery and aggravated rape on one victim on one occasion have been found contrary to the carving doctrine, yet successive prosecutions for rape and sodomy of one victim on the same occasion have been held permissible. See Orosco v. State, 590 S.W.2d 121 (Tex.Cr.App. 1978) and Ex parte Joseph, 558 S.W.2d 891 (Tex.Cr.App. 1977). The doctrine of carving is unsound and its application has been erratic.

The doctrine of carving was court made; constitutions and statutes make no provision for such a doctrine. Since we are abandoning the carving doctrine, we will not decide double jeopardy questions under the strict construction of the Constitutions of the United States and of this State. The prohibitions against being twice put in jeopardy for the same offense requires a test for defining the

"same offense." The Supreme Court of the United States has provided such a test:

> "[T]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); Whale v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980). The Blockburger test is satisfied if each statutory offense requires the proof of a fact that the other does not. At trial there may be a substantial overlap in the proof of each offense; however, it is the separate statutory elements of each offense which must be examined under this test. Brown v. Alabama, 619 F.2d 376 (5th Cir. 1980).

The Blockburger rule will not preclude two convictions here; each statute requires proof of a fact which the other does not. See V.T.C.A. Penal Code, Secs. 20.04 (Aggravated Kidnapping) and 29.03 (Aggravated Robbery).

Opinions of the Supreme Court after Blockburger have dealt with other double jeopardy matters. See Brown v. Ohio, supra; Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977); Illinois v. Vitale, supra; Whalen v. United States, supra, but the matters considered in those cases are not matters pertinent to the decision in this case.

Since there is no double jeopardy violation in the convictions for aggravated kidnapping and aggravated robbery, the State's Motion for Rehearing is granted; the relief sought will be denied.

It is so ordered.

DALLY, Judge

Delivered May 12, 1982

EN Banc

DISSENTING OPINION

A statute requires that, "The Court of Criminal Appeals, in each case decided by it, either on appeal or on review, shall deliver a written opinion setting forth the reasons for such decision. . . ." and the court seems to have chosen so to hear it, for the court has delivered a written opinion setting forth six reasons for its decision. It might as well have refrained from doing so, for none of the reasons can justify its decision to discard the carving doctrine.

The court's first "compelling reason" is deterrence. It says that, under the carving doctrine, "a defendant [who] robs, kidnaps, rapes, and murders his victim . . . suffers no more punishment than he would had he committed only

one of the crimes. Justice and reason demands [sic] prosecution for each of the separate offenses," to deter such episodes. This seems to be more a rhetorical flourish than a compelling reason. A person who robbed, kidnapped, raped, and murdered his victim could be punished by death, regardless of the carving doctrine. 2/ It is not clear, even in the lights of justice and reason, that the prospect of an additional term of imprisonment would be a marginally greated deterrent than the prospect of death.

Even if murder is removed from the court's list of horrible hypotheticals each of the remaining offenses is punishable by confinement for life. 3/ It is unlikely that many robbers who are not deterred by the prospect of one life

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1/ V.A.C.C.P., Art. 11.07, Sec. 3.

2/ V.T.C.A., Penal Code, Sec. 19.03(a)(2).

3/ V.T.C.A., Penal Code, Secs. 20.04(b) (aggravated kidnapping), 21.03(c) (aggravated rape), and 29.03(b) (aggravated robbery).

sentence will be deterred from abducting their victims by the prospect of two life sentences; it seems more likely that robbers expect not to be caught at all. If Texas had shorter, determinate sentences, it might make sense to say that multiple punishments ar needed to reflect the seriousness of a criminal episode that comprised multiple offenses. But Texas' law provides a very wide range of punishment, with a very high maximum, for each felony. Therefore, the sentencer is allowed to take into account all the aggravating circumstances of the criminal episode, and to set punishment at the high end of the scale for a single offense. 4/

Not only are multiple punishments unneeded in most cases, they are unlikely to be imposed frequently. If the court's hypothetical defendant is indicted for

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4/ This same purpose underlies V.T.C.A., Penal Code, Sec. 12.45 ("Admission of Unadjudicated Offense").

robbery, kidnapping, and rape, he may insist on separate trials. After obtaining a conviction and a long sentence for one offense in an episode, a prosecutor will not often choose to expend his (and the court's and the witnesses') time and money in a sequence of prosecutions for the other offenses in the episode. The court's first, "compelling" reason cannot withstand scrutiny.

The court's second reason is that "the doctrine of carving is not mandated by the Double Jeopardy Clauses." This is only half true. The court is correct in holding that the United States Constitution does not require the carving doctrine, but it is wrong about the Texas Constitution.

The Supreme Court has not held explicitly that the Fifth Amendment does not require the carving, or "same transaction," test, but it has rejected opportunities to adopt the test so often that the point is sufficiently clear.

See, e.g., Brown v. Ohio, 432 U.S. 161, 170 (1977) (Brennan, J., concurring); Thompson v. Oklahoma, 429 U.S. 1053 (1977) (Brennan, J., dissenting to denial of certiorari) (collecting ten other denials of certiorari); Harris v. Washington, 404 U.S. 55, 57 (1971) (statement of Douglas, Brennan, and Marshall, J.); Ashe v. Swenson, 397 U.S. 436, 442 (1970) (Brennan, J., concurring): Abbate v. United States, 359 U.S. 187. 196 (1959) (separate opinion of Brennan, J.); Hoag v. New Jersey, 356 U.S. 464, 477 (1958) (Douglas, J., dissenting). See also Pennsylvania v. Campana, 414 U.S. 808 (1973) (vacating state court judgments in which plurality had held that Fifth Amendment required "same transaction rule," and remanding for consideration of whether judgments were based on state or federal constitu-

tions, or both). 5/ Recent holdings of this court that a violation of the carving doctrine is a violation of the Fifth and Fourteenth Amendments, are wrong.

States may give greater protections to individual rights than the minimums required by the Fourteenth Amendment, however. Cooper v. California, 386 U.S. 58, 62 (1967). It long has been held that the double jeopardy provision in the Texas Bill of Rights 6/ does just that.

In Hirshfield v. State, 11 Tex.App. 207, 214 (1881), the court considered the question, "What is meant by the term 'same offense [in the Texas Double Jeopardy Clause]?" After discussing the doctrines of former acquittal and former conviction, the court pointed out that

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5/ On remand the plurality abandoned its Fifth Amendment holdings and the court adopted the "same transaction" rule as state law. Commonwealth v. Campana, 455 Pa. 622, 314 A. 2d 854 (1974).

6/ Tex. Const., Art. 1, Sec. 14.

"it must be borne in mind that there is another principle applicable to this subject of jeopardy, which is quite distinct for that which obtains in pleas of former conviction or acquittal generally. This is the doctrine of carving. . . ." Id. at 215. Carving has had a constitutional basis for a century. The court is simply wrong in saying that it was "initially" applied in 1896 and that it is "not supported by . . constitutional provisions." The court is correct in recognizing that carving is not a federal doctrine, but it is only pretending that carving is a mere "tradition" which is not rooted in the Texas Constitution.

The court's third reason for rejecting carving is that it is a "rule applied only in this jurisdiction." This, too, is wrong insofar as it implies that no other jurisdiction uses a "same transaction" rule. As of 1965, at least five

states used such a rule, 7/ and at least one other state has adopted such a rule since. 8/ Exhaustive research might discover others.

The court's fourth reason for its decision is that the carving doctrine has been stated and applied more consistently. This is undeniably true (although not all of the court's examples actually show inconsistency.). 9/ But this reason can justify only a reform of the doctrine so that it will be stated and applied more consistently. Judge Clinton's

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7/ 75 Yale L.J. 262, 270 n.34 (1965) (Alabama, Georgia, New Jersey, Oklahoma and Texas).

8/ See n.5, supra.

9/ As an example of carving cases that are in conflict, the court cites Lee v. State, 505 S.W.2d 816 (Tex.Cr.App. 1974), comparing it with Ex parte Calderon, 508 S.W.2d 360 (Tex.Cr.App. 1974). A close reading of the Lee opinion reveals that the carving doctrine was not applied at all; the case seems to have been disposed of on federal, Blockburger-style analysis. Lee does not illustrate inconsistent application of carving. It may illustrate, instead, a confusing of carving with Blockburger.

opinion, below, discusses this at length, so I shall pass on to the court's fifth reason: legislative intent.

The court claims (in footnote 1 and the accompanying text) that the legislative rejection of a proposal to reform the carving doctrine in Chapter 3 of the proposed penal code indicates an intent to abolish that doctrine. The logic is not apparent. One would suppose that a legislative rejection of a reform would indicate the opposite: the Legislature's unwillingness to change this well established rule of law.

The court's sixth reason is strict constructionism. The court points out that "the constitutional provisions speak of double jeopardy in terms of the 'same offense' rather than 'same transaction,'" and concludes, "The doctrine of carving was court made; constitutions and statutes make no provision for such a doctrine. . . . [W]e will now decide double jeopardy questions under the

strict construction of the Constitutions of the United States and of this State"; that is, by the Blockburger rule.

Close inspection of the double jeopardy clauses will not reveal the Blockburger rule any more than it reveals the carving rule. The one is exactly as "court made" as the other. The role of this court is to fashion such rules so that the broad commands of the constitution can have specific applications. How can one strictly construe terms such as "due process," "equal protection," or "unreasonable searches and seizures"? As a legal historian has said, "Strict constructionism can be a balm for the judicial conscience, but not much more. The imprecision of the constitutional text makes strict constructionism a faintly ridiculous usage . . . . It is a form of judicial laissez-faireism by which the judge . . . defers to other

branches of government, 10/ or to the states, or to law-enforcement agencies, as the case may be." L. Levy, Against the Law 30-31 (1974).

Section 14 of the Texas Bill of Rights says, "No person, for the same offense, shall be twice put in jeopardy of life or liberty. . . ." Like the corresponding clause in the Fifth Amendment, it contains "deceptively plain language [which] has given rise to problems both subtile and complex. . . ." Crist v. Bretz, 437 U.S. 28, 32 (1978). The carving doctrine is a solution to the problems of deciding when a person may be subjected to multiple trials or punishments for closely related acts; the Blockburger test is part of a different approach to one of these problems. The suggestion that one is based on a

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10/ Compare the court's opinion, ante: "The deference which the Supreme Court has shown to the United States Congress should also be shown by this Court to the Texas Legislature."

stricter construction of the constitutions than the other is false; there cannot be a strict construction of the constitutional term, "same offense."

It is worth repeating that the Blockburger test, adopted today, is not a substitute for the carving doctrine. To begin with, Blockburger will not resolve the question of whether multiple trials may be had (as distinguished from multiple punishments which are imposed in only one trial). Brown v. Ohio, 432 U.S. 161, 166 n.6 (1977). Even in the area of multiple punishments Blockburger is not the tool of mechanical and consistent adjudication for which the court seems to yearn.

> "[The] assumption that Blockburger defines the scope of the double jeopardy clauses misconceives the purpose and nature of that rule: Blockburger is not a constitutional 'litmus test' for determining whether a particular sentence violates the double jeopardy clause. Rather as the Supreme Court made clear in Whalen [v. United States, 445 U.S. 684 (1980)], Blockburger is

> 'a rule of statutory construction . . . relied on . . . to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively.' 445 U.S. at 691 (footnote omitted). * * * [T]he essential inquiry is Congress' intent. See 445 U.S. at ____, 100 S.Ct. at 1436." United States v. Hawkins, 658 F.2d 279, 287 (5th Cir. 1981).

The Texas Legislature's intent is much harder to find than Congress', for the sources have been nearly non-existent, 11/ and are obscure even today. 12/

It is worth mentioning, too, that the court is creating a collision between the Blockburger analysis and its analysis of lesser included offenses. As the court holds today, Blockburger regards as irrelevant the fact that "[a]t trial there may be a substantial overlap in the proof of each offense; . . . it is the

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11/ Gillette v. State, 588 S.W.2d 361, 364, 368 (Tex.Cr.App. 1979) (Roberts, J., dissenting).

12/ See Ex parte Byers, 612 S.W.2d 534, 536 (Tex.Cr.App. 1980), which was based on four untranscribed tape recordings.

separate statutory elements of each offense which must be examined under this test." This court's analysis of lesser included offenses is the opposite; at least part of the time, on the facts of the case, an offense was a lesser included offense even though its elements were not strictly encompassed by the offense alleged. See, e.g., Christiansen v. State, 575 S.W.2d 42, 44 (Tex.Cr.App. 1979) (under some circumstances, issuance of a bad check may be a lesser included offense of theft); Hazel v. State, 534 S.W.2d 698, 700-701 (Tex.Cr.App. 1976) (unlawful carrying of weapon is lesser included offense of unlawful possession of firearm by felon, even though former offense requires proof of "carrying," which latter offense does not). 13/

13/ These cases derive from Day v. State, 532 S.W.2d 302, 315-316 (Tex.Cr.App. 1976), in which the court construed V.A.C.C.P., Art. 37.09(1): "An offense is a lesser included offense if . . . it is established by proof

Footnote continued on next page.

Until these holdings are reconciled, the law will be that, even though an offense is a lesser included offense of another under state law, a person may be convicted and punished for both under Blockburger. This will be constitutionally interesting.

The court discards an accepted doctrine for no good reason, in exchange for a doctrine that will involve more difficulties than it now admits. I am not

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Footnote continued from previous page.

of the same or less than all the facts required to establish the commission of the offense charged . . . " The dictum in Day that the statute "defines lesser included offense in terms of the facts of the case" has been misinterpreted to mean the evidence in the case. Under this misinterpretation, the offense of unlawfully carrying a weapon could be a lesser included offense of merger if the evidence showed that the alleged murderer was carrying a weapon. The correct construction of Day (and of the statute) is that the term "facts" refers to "factual elements." By this construction, the lesser included offenses in a case can be determined from the four corners of the indictment, which alleges the "facts required to establish the commission of the offense," as distinguished from mere matters of evidence.

convinced that the grass is greener on the Blockburger side of the defense. I dissent.

ROBERTS, Judge

DELIVERED: May 12, 1982

EN BANC

Onion, P.J. and Teague, J. join in this opinion

EX PARTE STEPHEN McWilliams — Habaes Corpus Application

No. 64,508 — From FORT BEND County

DISSENTING OPINION ON STATE'S MOTION FOR REHEARING

Application of the carving doctrine by Texas courts for more than one hundred five years now has provided a significant protection against the citizen being twice placed in jeopardy. Its brutal dispatch by a majority of my Brothers "got the blood of controversy in my neck," 1/ and I must dissent.

1/ Justice Oliver Wendel Holmes, in a letter to Laski, once explained that the matter of salaries of judges being included in the income tax did not interest him particularly, he was not "at all in love with what I had written" in dissent and had not "got the blood of controversy in my neck." 1 Holmes-Laski Letters 68 (Howe ed. 1953) at 266. One other occasion Holmes had not intended to write in dissent "when the opinion came and stirred my fighting blood." Id., at 560. "here," applauds one commentator, "is the stuff dissents are made of." Schaefer, Precedent and Policy, 34 U.Chi.L.Rev. 3 (1966), reprinted by permission in Aldisert, The Judicial Process (West Publishing Co. 1976) 802, 804.

In 1876 the Supreme Court of Texas found in Wilson v. State, 45 Tex. 76 (1876) that "the great weight of American authorities" supported the conclusion it was to reach. Included was an Indiana decision, Jackson v. The State, 14 Ind.R. 327, from which the Texas Supreme Court extracted the following:

> "The State cannot split up one crime and prosecute it in parts. A prosecution for any part of a single crime bars any further prosecution based upon the whole or part of the same crime." Wilson, supra, at 83.

In conclusion:

> "[When] the transaction is the same [it] is but one offense against the State, and . . . the accused cannot be convicted on separate indictments charging different parts of one transaction as a distinct offense. A conviction on one of the indictments bars a prosecution on the other." Ibid.

Also in 1876 the other appellate court in Texas decided Quitzow v. State, 1 Tex.App. 47 (Ct.App. 1876), and so far as can be ascertained the first shorthand rendition of the carving

doctrine appeared in the opinion of the Court written by Presiding Judge White:

> "The prosecutor had a right to carve as large an offense out of this transaction as he could, but yet must cut only once." Id., at 53-54. 2/

The "transaction" was Quitzow's hiring from a livery stable a horse and, at the same time, a saddle and bridle and not returning them when agreed. Applying the carving doctrine, the Court held that conviction of theft of the horse precluded trial and conviction for theft of saddle and bridle. The Court relied on and discussed Wilson v. State, supra, and several other authorities.

In Simco v. State, 9 Tex.App. 338 (Ct.App. 1880) Presiding Judge White, for the Court, opined why once a defendant,

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2/ A year before the Supreme Court of Texas had noted in passing, "It is a general rule that a party may in a criminal proceeding be held to answer for any offense, great or small, which can be legally carved out of the transaction," citing Bishop on Criminal Law. Jackson v. State, 43 Tex. 421, 423 (1875). (All emphasis is mine unless otherwise indicated.)

who stole three horses simultaneously, each belonging to a different owner, was convicted of theft of any one of them, he could not thereafter be convicted of theft of the other horses,

> "Because the transaction -- the taking of the three horses at the same time -- would constitute but one offense in law (Wilson v. The State, 45 Texas 76); and the plea [of former conviction] would be good upon the strength of, and by virtue of another rule, well settled in criminal practice, which allows the prosecutor to carve as large an offense out of a single transaction as he can, yet he must cut only once. Quitzow v. The State, 1 Texas Ct.App. 47. Here is where the doctrine of carving would come in and support the plea. [Referring to Wharton Criminal Law and 'authorities cited in the note.']" Id., at 349.

The following year Judge Hurt wrote for the Court in Hirshfield v. State, 11 Tex.App. 207 (Ct.App. 1881). Upon indictment alleging all of the elements constituting the offense of uttering a forged instrument followed by other allegations of swindling Hirshfield was convicted of swindling. Then in effect

was a provision of the panel code that precluded the offense of swindling from taking a case of theft or some other proscribed offense "out of operation of law which defines such other offense," and on this ground Hirshfield had expected to the indictment, contending he could not, therefore, be prosecuted for swindling. The contention was rejected by the trial court and the jury was instructed that the trial was for the offense of swindling. The Court held the exceptions should have been sustained, reversed the judgment and dismissed the prosecution.

In the opinion of the Court Judge Hurt examined the meaning of Article I, § 14, the jeopardy clause in the Constitution of the State of Texas and concluded that "a person shall not be twice put in jeopardy for the same act, acts, or omission, which are forbidden by positive law, and to which is annexed, on conviction, any punishment prescribed in

this Code." it followed, therefore, that "a conviction for swindling which rests upon and is supported alone by the act of passing as true the instrument set forth in this indictment is a full and complete satisfaction of the law which forbids, and upon conviction prescribes, a punishment for said act." But though the same act of passing as true a forged instrument "enters into and constitutes the vital elements of, at least, two offenses, to wit, swindling and knowingly uttering a forged instrument as true," a conviction for that act "would be a complete satisfaction of the violated law." As a general proposition it was correct that as an accused "could not have been convicted under the indictment for swindling of the offense of knowingly passing as true a forged instrument, therefore he cannot plead this conviction swindling to a prosecution for uttering a forged instrument," still

> "[i]t must be borne in mind that there is another principle applicable to this subject of jeopardy, which is quite distinct from that which obtains pleas of former conviction or acquittal generally. This is the doctrine of carving, and is explicitly recognized and effectively applied in a number of cases by our Supreme Court and Court of Appeals. [Citing them and others]." 3/ Id., at 215.

Presiding Judge White reiterated the doctrine in Wright v. State, 17 Tex.App. 152 (Ct.App. 1884), a case where the accused had been acquitted of stealing cattle of Houston and then put to trial and convicted of theft of cattle of Floyd at the same time. The Court held that a plea of former acquittal was not good, but demonstrated that if the case had been one of former conviction a plea of

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3/ Quitzow v. State, supra; Wilson v. State, supra; State v. Damon, 2 Tyler 387; State v. Williams, 10 Humph. 101; Lumpkin v. State, 14 Ind. 327; State v. Nelson, 29 Me. 329; Ben v. State, 22 Ala. 9, Rex v. Benford, Barr, 930; Clem v. State, 42 Ind. 420.

former conviction would have been sustained because:

> ". . . the transaction being but one, the prosecution could carve but once, and having once carved and convicted it could not claim another and second conviction against the same party for the single offense. It is the doctrine of carving, a well established principle of criminal law, which makes this distinction between the pleas of autrefois acquit and autrefois convict where several ostensible crimes are covered by a single transaction. But for this doctrine of carving, [the] plea of former conviction would not be maintainable in law."

Reference is made to his earlier opinion in Simco; then the Presiding Judge further explains that had Wright been first convicted of taking Houston's cattle,

> "the State had carved already and obtained his conviction for the same offense, and in law that is a satisfaction of the entire offense so far as he is concerned."

Wilson v. State, supra, is then relied upon. Id., at 159.

Appellate jurisdiction in criminal cases was transferred and vested in the

Court of Criminal Appeals by constitutional amendment adopted in 1891 that became Article V, § 5. Through Judge Davidson, who had moved over from the Court of Appeals, 4/ the Court would soon state, "If the same violence and assault were relied upon in both cases to sustain the conviction, then the plea [of former conviction] was well grounded; or, if it was one continuous transaction, in which appellant perpetrated the robbery by the assault, the prosecution could come but once," Moore v. State, 33 Tex.Cr.R. 166, 25 S.W. 1120 (1984). In Herera v. State, cited and discussed in the majority opinion, the Court explained the carving doctrine in more expansive terms, viz:

> "[W]hen one transaction is presented to the government, which may include distinct criminal offenses, the government can carve but once. It can take the greater, and prosecute for that; or it can take the lesser offense, and prosecute for that; and a prosecution and

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4/ 14-20 S.W. (iii).

> conviction of neither will equally be a bar to another subsequent prosecution for the other offense, which involved the same transaction." Id., 34 S.W. at 944.

Finally, for my present purposes, in Sadberry v. State, 39 Tex.Cr.R. 466, 46 S.W. 639 (1898), the Court was confronted with an unusual fact situation implicating the carving doctrine. Sadberry, "on account of some indignities heaped upon him during the day by some fishermen," approached their camp at night while the four of them were seated around a campfire playing cards. From his gun loaded with No. 5 shot and slugs, Sadberry fired one shot that wounded all four campers. He was later tried and convicted of shooting one of them with intent to murder, and when then placed on trial for assaulting the brother of the first with intent to murder pleaded former conviction. That plea, the Court found, was well taken and should have been

sustained. For the Court Judge Davidson pitfully wrote:

> "The state had carved its case, and had secured a conviction, and, having done so, under the state of the case disclosed by the record, it was not entitled to further prosecution. See Simco v. State, 9 Tex.App. 338; Wright v. State, 17 Tex.App. 152. The doctrine laid down in the two cases is the well-settled rule in Texas, and it is not necessary to cite other authorities."

What had been demonstrated thus far, then, is that over the course of some twenty years the Supreme Court of Texas, the Court of Appeals and the Court of Criminal Appeals, each in its own time, found, understood, applied and explained the carving doctrine to the bench and the bar - all without disagreement serious enough to provoke a dissenting point of view. Such a firmly grounded doctrine of law ought not be jettisoned because latter day judicial writings are seen by some to make an "erratic" application of it.

Even less attractive is the notion that the doctrine is somehow inherently suspect because it is a judicial creation which, it is said by the majority, finds no "mandate" in jeopardy provisions of our constitutions. The whole body of common law was made and modified for centuries without constitutional dictates. 5/ The great jurists who wrote for their respective courts in this State before the turn of the century never pretended the carving doctrine was constitutionally prescribed in precise words and terms, but they did find that it provided a bar against a citizen's being again put in jeopardy for another offense shown by plea of former conviction to have been committed in the

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5/ "The common law consists not only of judicial precedents (opinions in decided cases) but of principles, standards, doctrines, and traditions. * * * Our common law started in the Middle Ages, from practically nothing." Leflar, Sources of Judge-Made Law, 24 Okla.L.Rev. 319 (1971), quoted by Aldisert, op. cit. supra, at 92-93.

same transaction covering the first offense, Wilson v. State, Simco v. State, Hirshfield v. State, Herrera v. State and Sadberry v. State, all supra, and that the doctrine was so well established in the criminal law that it should be applied, and they uniformly insisted that the carving doctrine be followed by the prosecutors and trial courts of the State.

Moreover, during the one hundred and five years the doctrine has been at work in Texas the code of criminal procedure and the penal code have four times simultaneously been revised - 1879, 1895, 1911 and 1925 - and once in its now time: the code of criminal procedure in 1965 and the penal code in 1973. Never has the Legislature of this State, whose members are presumed by law to know the doctrine 6/ and surely possess the power

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6/ Reynolds v. State, 547 S.W.2d 590, 592 (Tex.Cr.App. 1977); Townsend v. State, 427 S.W.2d 55, 62 (Tex.Cr.App. 1968).

and authority to do so, repealed, amended, altered or modified the doctrine. On the contrary, it is a matter of record that the Legislature only recently rejected a proposal to do that.

Chapter 3 in the proposed revision of the penal code as originally introduced reported out by committee broadly defined "criminal episode" to embrace all offenses produced by the same criminal conduct as well as all offenses aimed at accomplishment of a single criminal objective, and for the first time would have

> "codified all the law in this area; substituted a single precisely-worded definition of criminal episode of the five different definitions of 'transaction' identified in the case law; and incorporated recent U.S. Supreme Court decisions changing the Texas law in this area."

That undertaking has been acknowledged as "ambitious" by Searcy and Patterson, "cutting across as it had to both substantive penal law and criminal

procedure." The proposal was rejected by adoption of a floor amendment which corrupted the concept and reduced its application to "the repeated commission of any one offense defined in Title 7 of the code [Offenses Against Property]." 7/ The pair of consultants and observers have "no doubt its scope and the several radical changes it would have effected in texas law contributed to its rejection." Practice Commentary following V.T.C.A. Penal Code, § 3.01.

Putting this record of what the Legislature cut out to the proposed Chapter 3 in the light of its presumed knowledge of the longstanding carving doctrine, we are "entitled to assume that the legislature, through its inaction, indicated its approval" of the doctrine, Allen Sales & Servicenter, Inc. v. Ryan, 525 S.W.2d 863, 866 (Tex. 1975); see also

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7/ As thus defined, "criminal episode" does not implicate the carving doctrine at all.

Republic Ins. Co. v. Poole, 257 S.W. 624, 625 8/ (Tex.Civ.App. 1923 - San Antonio, writ ref'd.).

Therefore, though the carving doctrine be a judicial creation, still legislative approval and sanction of the doctrine just eight years ago - the last time - may be strongly inferred.

8/ "That decision [of the Supreme Court of Texas] was followed in this state and was the law when the present insurance statute was enacted, and, if the Legislature had desired to change the law as promulgated by the Supreme Court, it would have been enacted that no parole contract for insurance should ever be valid. This was not done, and the inference will arise that the Legislature sanctioned the construction placed upon insurance policies by the Supreme Court."

In spite of what is so obvious in this respect, the majority somehow gleans from rejection of proposed Chapter 3 and enactment of the four sections that have nothing to do with the carving doctrine that the Legislature "appears" to have intended "to allow prosecutions for each offense occurring within one criminal transaction." But the law is that a change in the status quo of a doctrine is not to be inferred unless the legislative body has unmistakably indicated a contrary wish. Bush v. Oceans International, 621 F.2d 207, 211, n.5 (CA 5 1980). Since the Legislature did not tinker with the carving doctrine at all, there is no indication of any desire to abolish it, much less an unmistakable one.

That the power to define offenses lies in the Legislature is rudimentary, and undoubtedly once it has defined a statutory offense that prescription of the "allowable unit of prosecution" determines the scope of protection

afforded by a prior conviction or acquittal, just as the Supreme Court of the United States reiterated in Sanabria v. United States, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978). But to characterize that statement as showing a kind of "deference" to Congress that this Court should show to the Legislature is to call it something it is not. The opinion of the Supreme Court went on to explain in the margin that since "only a single violation of a single statute is at issue here," there was no need to analyze the case under familiar jeopardy tests "used to determine whether a single transaction may give rise to separate prosecutions, convictions and/or punishments under separate statutes." Patently the Supreme Court is not showing "deference" to the point of abdicating its own constitutional duty and function to decide jeopardy questions under doctrines it has developed over the years - and the

cases cited and discussed in the footnote, Sanabria, supra, U.S. at 70 reflect there are several in the federal judicial system as well.

Nor is it disconcerting enough that two theories have developed in analyzing what constitutes the "same transaction" for purposes of applying the carving doctrine. This is but a recognition that human criminal behavior does not uniformly follow the same pattern. In trying to decide what is the "same offense" for constitutional jeopardy purposes the Supreme Court of the United States has developed essentially two different theories.

The Blockburger test, set forth in the majority opinion, is only one. There is the Neilsen perception as well; it applies, like one of the carving theories, when a number of offenses arise from a continuous transaction. Ex parte Neilsen, 131 U.S. 176 (1889) states:

> "[A] person [who] has been tried and convicted for a crime which has various incidents included in it . . . cannot be a second time tried for one of these incidents without being twice put in jeopardy for the same offense." Id. at 188. 9/

See Brown v. Ohio, 432 U.S. 161, 166, n.6 (1977) in which the Supreme Court recognizes that in providing a test for determining what is the "same offense" Blockburger and Neilsen stand on different footing; it also notices "additional protection" supplied by the more recently enunciated doctrine of collateral estoppel in Ashe v. Swenson, 397 U.S. 436 (1970). In short, neither has the Supreme Court abandoned any test formulated by it early and late in addressing the "same offense" declaration

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9/ This concept follows Ex parte Snow, 120 U.S. 244 (1887) and distinguishes the principle flowing from the language of Morey v. Commonwealth, 108 Mass 433, that constitutes the foundation of Blockburger, supra. See Gavieres v. United States, 220 U.S. 338, 342 (1911).

nor is it abashed that there are two theories which may be considered. 10/

Finally, the majority takes pains to note that the carving doctrine is indigenous in Texas - a proposition that will not withstand cursory examination. 11/ Even the same unique terminology has been used, without attribution to Texas: "Merely because one element of a single

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10/ Thus, the assurance in the majority opinion that the Court will decide jeopardy questions with a "strict construction" attitude is baffling. Nothing in the Sixth Amendment remotely states either the tests of Blockburger or Neilsen or the Ashe v. Swenson doctrine of collateral estoppel, nor has the Supreme Court of the United States even claimed they are born on "strict construction." Indeed, as indicated in note 9, ante, the Blockburger test has been traced back to an opinion of the Massachusetts Supreme Court, with a nodding acknowledgement along the way to Mr. Bishop. See Burton v. United States, 202 U.S. 344, 381 (1906), one of building blocks of Gavieres v. United States, supra.

11/ "Where an offense is essentially and substantially a single one, the state cannot divide it into two or more offenses and punish for each separately. So, it is held that a single act or transaction may not be split inot two or more separate offenses . . .," 22 C.J.S. 27, Criminal Law § 9(1). In Kansas, "two separate offenses cannot be carved out of the one criminal delinquency," State v. Pierce, 205 Kan, 433, 469 P.2d 308, 312 (Kan. 1970).

criminal act embraces two persons or things, a prosecutor may not carve out two offenses by charging the several elements of the single offense in different counts. . .," Robinson v. United States, 143 F.2d 276, 277 (CA10 1944). And before 1876 when the Supreme Court of Texas decided Wilson v. State, supra, and the former Court of Appeals decided Quitzow v. State, supra, the "general rule" had already been discerned from Mr. Bishop (1 Bishop on Criminal Law, 536) in Jackson v. State, supra, note 2, at 423. 12/

12/ 1 Bish. New. Cr. Law, § 791 reiterated the doctrine:

> "One answerable for a criminal transaction may be held for any crime, of whatever nature, which can be legally carved out of his entire offending. He is not to elect, but the prosecuting power is."

Quoted by the Court in Kaufman v. State, 70 Tex.Cr.R. 438, 159 S.W. 58, 64 (1913); in his Eighth Edition (1892), at 478, n.1 Mr. Bishop supports the text with citations to four English cases, three state cases and one of the Supreme Court of the United States - none from Texas.

But if Texas is the only state adhering to the carving doctrine, must an established doctrine be abandoned for that reason? Just two years ago a strenuous dissenting opinion in Orosco v. State, 590 S.W.2d 121, 124 (Tex.Cr.App. 1979) which, one quickly notes, bears shrinking similarities to the opinion of the Court in the case at bar, did not sway a majority of my Brothers. What public interest persuades them today?

There are sound policy considerations supporting our carving doctrine, not the least of which is that the people of the State of Texas, through its grand jury, assisted by its prosecuting attorney in drawing an indictment against an accused for criminal conduct, are better served by the State "taking its best shot," so to speak, the first time rather than trying to improve on its

successive rounds. 13/ It is a demonstrable tactic, as Kirschheimer proves from the cases, for some prosecutors to hold in reserve facts as well as theories of law to advance when their first efforts do not succeed as desired. 14/

13/ The majority today and the dissenters in Orosco v. State, supra, selectively extract criticism from scholarly writers. Thus, one is not supposed that no mention is made of the thrust at "the skillful prosecutor" who finds it easy to manipulate offense categories so as to "sidestep" jeopardy protections. See Kirschheimer, The Act, The Offense and Double Jeopardy, 58 Yale L.J. 513, 525 (1949). And faulting the "same transaction test" without revealing that Kirchheimer sees it as too favorable to an accused, also disregards his solution to the problem: a modified same transaction test with liberalization of practice of amending charging instrument, Id., at 534.

14/ The classic case, of course, is Ciucci v. Illinois, 356 U.S. 571, 78 S.Ct. 839, 2 L.Ed. 983 (1957). Three of four separate indictments charging Ciucci with murder of his wife and three children, respectively, were tried; the first resulted in 20 years imprisonment, the second in 45 years and, finally, the third produced the death penalty. Though the Supreme Court in a Per Curiam opinion found no violation of due process, Illinois Supreme Court was moved to take remedial action, People v. Golson, 32 Ill.2d 398, 207 N.E.2d 68, 75 (1965), and the Illinois Legislature enacted corrective measures, People v. Mullenhoff, 33 Ill.2d 445, 211 N.E.2d 741 (1965).

That is precisely what the courts have said the carving doctrine was intended to prevent. 15/

The "fundamental unfairness of repeated trials for the same illegal conduct is apparent and has troubled the courts and the legislature," People v. Golson, supra, note 9, at 75. The carving doctrine is designed to relieve that fundamental unfairness, though the jeopardy provisions of our constitutions may not. See People v. Mullenhoff, supra, note 9, at 450. Thus, in Herera, supra, in quoting from an earlier New Jersey opinion the Court approved the proposition that "it is better that the

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15/ Again in Herrera, supra:

> "It was competent for the state to prosecute and convict for either of said offenses which involved the same transaction, but having selected one, no matter if it was the lesser offense, the state is bound by its election; and, having convicted the party for the offense chosen, it cannot proceed against the accused for the other greater offense which involved the same transaction." Id., at 944-945.

residue of the offense go unpunished than, by sustaining the second indictment, to sanction a practice which might be rendered as an instrument of oppression to a citizen." 16/

The majority of the Court does not make any compelling showing that such policy considerations have suddenly become unsound. 17/ Nor has it provided

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16/ Herrera held that a conviction for assault with intent to murder barred a subsequent prosecution for robbery committed in the same transaction. Trial on the robbery indictment was held after Herrera had been sentenced to serve seven years for the assault with intent to murder and had "served out his time," Id., at 943. Truly, the second prosecution and conviction constituted "an instrument of oppression."

17/ At least the dissenting opinion in Orosco v. State, supra, argued the philosophical notion that "[o]ne should not be permitted to exhibit a weapon to another and commit several offenses against that person and be liable for punishment for only one offense," Id., at 125, nor "commit as many crimes against that person as he wishes without fear of punishment except for one crime," Id., at 129. But e.g., Blockburger and Neilsen, supra, are designed to provide protection against "multiple punishments for the same offense," North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Brown v. Ohio, 432 U.S. 161. 165 (1977).

a principled reason to approve that which has long been rejected "as an instrument of oppression." That the Court has encountered "difficulties" in applying the doctrine impugns members of the Court more than the doctrine itself, and suggests that efforts at consistency in application ought to be made before surrendering to a professed inability to do the judicial job. 18/

In abandoning a salutary doctrine extent more than one hundred and five years in this State, a slender majority

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18/ Contrary to the assertion of the majority, this dissenting opinion is not intended to be and may not reasonably be read to "urge" that only one conviction "should be allowed" when an accused engages in several vicious acts against a victim. All the opinion has done in this respect is to report a policy consideration that was identified in the work by one of the scholarly writers cited by the majority for its purposes. See notes 13 and 14 and accompanying text ante. That his 1949 findings are invalid and his conclusions are unsound have not yet been demonstrated by the majority. Solutions proposed by Kirchheimer and others should at least be examined before problems in applying the carving doctrine are solved simply by cutting it out of the law.

of the Court exposes the citizens to a risk of deprivation of liberty unequaled in the annals of Texas jurisprudence. 19/

I dissent.

CLINTON, Judge

(Delivered May 12, 1982)

EN BANC

19/ Belatedly asserted by the majority is the bald statement that "the compelling reason" for abandoning the carving doctrine is "that it encourages crime." Were there the slightest suggestion of support for that proposition, the majority opinion needs to reveal it, for criminology would be mightily advanced with that knowledge which somehow has eluded the best minds in the field. But, of course, there is none.

Bl.11

III. OPINION DISSENTING TO DENIAL OF LEAVE TO FILE SECOND MOTION FOR REHEARING

III. OPINION DISSENTING TO DENIAL OF LEAVE TO FILE APPELLANT'S MOTION FOR REHEARING

Ex Parte Stephen McWilliams, No. 64,508 (Tex. Crim. App., July 14, 1982).

Original submission the Court found that the indictment for aggravated rape is fundamentally defective and, accordingly, ordered that indictment in Cause No. 10,170 dismissed. On State's Motion for Rehearing the Court does not disturb the relief thus granted. There remains before us, then, contentions with respect to aggravated robbery, Cause No. 10,169, and aggravated kidnapping, Cause No. 10,171. As to them, so anxious to abandon the carving doctrine, the opinion of the Court on rehearing did not undertake to place those alleged offenses in factual context in order to address the jeopardy problems.

The charging portion of the aggravated robbery indictment is set out verbatim in the opinion on original submission, and need not be reproduced

here. Suffice to say that the aggravation alleged is that on or about March 21, 1975 appellant did "knowingly threaten and place the owner in fear of imminent bodily injury and death by then and there using and exhibiting a deadly weapon, to wit, a firearm." The owner is identified by name indicating she is a female.

The aggravated kidnapping indictment alleged, in terms of V.T.C.A. Penal Code, § 20.01(2)(A) and § 20.04(a)(3), that also on or about March 21, 1975 appellant did intentionally and knowingly abduct the same named female he is alleged to have robbed "with the intent to facilitate his own flight after the commission of a felony, to wit: Aggravated Robbery."

The owner cum kidnap victim, whom we will call Mae, was then thirty-nine years of age, employed as a clerk at a convenience store on Highway 288 in Arcola, Fort Bend County. At about

11:00 p.m. on March 25, 1975, with the aid of her nineteen year old daughter and a seventeen year old girl friend, Mae had just closed the store and was locking outside ice machines when appellant walked up behind her. Producing a gun, he ordered her to unlock the door and, shortly, made the three females re-enter the place; brandishing and threatening to use the pistol, he had the teenagers lie face down on the floor while Mae located and gave him all the money in the store. Then he directed Mae to cut the telephone cord and, kneeling down with Mae, told her daughter and the girl friend to remain lying down for thirty-five minutes, that he was taking Mae with him and if she wanted her mother alive she better not move or she would never see her mother again. Taking two packages of cigarettes and two six packs of beer, appellant had Mae close her eyes, and he led her to a nearby station wagon.

That done, he drove around back roads, chattering all the time about sorrowful events in his life, 1/ until he managed to get stuck at an isolated dead end, where eventually at gunpoint he required Mae to commit a round of deviate sex acts and other indecencies, and then he raped her, twice. While he slept Mae made her escape. At about five o'clock in the morning, still supine in the station wagon, appellant was taken into custody without incident by two deputy sheriffs.

Applying the carving doctrine to such a classic situation, on original submission the Court set aside the

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1/ The opinion on original submission recounts at least two prior commitments to mental institutions and his ultimate escape from the second one. After first telling Mae he was going to kill her because he knew that her daughter had contacted the law, appellant relented and then poured out accounts of his brother's dying in his arms in Viet Nam, his wife's leaving him for another man, his own mother's expressed hope that he would die a hero so she could be proud of him - and on and on in similar paranoid vein.

conviction for aggravated kidnapping. We cited Orosco v. State, 590 S.W.2d 121 (Tex.Cr.App. 1979) and Ex parte Curry, 490 S.W.2d 712 (Tex.Cr.App. 1979) and Ex parte Curry, 590 S.W.2d 712 (Tex.Cr.App. 1979) for the proposition that "the carving doctrine precluded convictions for both aggravated robbery and aggravated rape, where it was shown that both offenses resulted from one continuous assaultive transaction against the same victim." It was noted that in Orosco it was found that "where the use and exhibition of a knife provided the aggravating circumstances in both offenses, appellant could not be convicted in both." Also relied on were Phillips v. State, 597 S.W.2d 929 (Tex.Cr.App. 1980) and Tatum v. State, 534 S.W.2d 678 (Tex.Cr.App. 1976), pointing out that the latter hold that "convictions for three offenses arising out of a single transaction against a single victim violated the double jeopardy clauses of both the

State and Federal Constitutions," and reversed two of the three convictions. Our opinion of original submission was delivered October 15, 1980 and the State's motion for rehearing was ordered filed and set for submission December 15, 1980; along with four other causes the May 12, 1982 majority opinion on State's motion for rehearing abandoned the carving doctrine and opted for the "same offense" test provided by the Supreme Court of the United States in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). 2/

However, dismissing it as dealing with "other jeopardy matters . . . [which] are not matters pertinent to the decision in this case," Slip Opinion,

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2/ Ex parte McWilliams, 632 S.W.2d 574 (Tex.Cr.-App. 1980-1982) was followed by Ex parte Mike, 632 S.W.2d 594 (Tex.Cr.App. 1980-1982); Ex parte Russell, 632 S.W.2d 596 (Tex.Cr.App. 1982); Ex parte Davis, 632 S.W.2d 597 (Tex.Cir.App. 1982) and Ex parte Silvas, 632 S.W.2d 598 (Tex.Cir.App. 1982) - all delivered the same day.

p. 6, the majority closed its eyes to the following statement of jeopardy law in Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977):

> "The Blockburger test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first. * * *
>
> Because we conclude today that a lesser included and greater offense are the same under Blockburger, we need not decide whether the repetition of proof required by the successive prosecutions against Brown would otherwise entitle him to the additional protection offered by Ashe and Nielsen."

Id. n.6, at U.S. 166-167. 3/

3/ The proposition of jeopardy law usually drawn from Ex parte Nielsen, 131 U.S. 176 is that "where . . . a person has been tried and convicted for a crime which has various incidents in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense," id., at 188. See, e.g., Harris v. Oklahoma, 433 U.S. 682, 97 S.St. 2912, 53 L.Ed.2d 1054 (1977).

In the aggravated kidnapping case at bar the State alleged and necessarily had to prove that appellant abducted Mae "with the intent to facilitate his own flight after the commission of a felony, to wit: Aggravated Robbery." To show the requisite to intent alleged, the State bound itself to prove commission of the offense of aggravated robbery of Mae. Thus, the conviction for aggravated kidnapping could not be had without proving the same aggravated robbery for which appellant had already been convicted. Under Nielsen appellant was twice put in jeopardy for the same offense. See Harris v. Oklahoma, supra.

Though the Court unwisely abandons the carving doctrine, as I and Judge Roberts have demonstrated in respective dissenting opinions on State's motion for rehearing, the majority is now about to create new confusion among the bench and the bar by pretending that Blockburger provides the only test to determine

"whether successive prosecutions impermissibly involve the same offense," and by refusing to analyze the jeopardy issues that come before us in light of Nielsen, as well.

To such judicial follow, I must dissent.

CLINTON, Judge

(Delivered July 14, 1982)

EN BANC

Onion, P.J. and Teague, J., join

B1.9

IV. DENIAL OF LEAVE TO FILE SECOND MOTION FOR REHEARING

IV. DENIAL OF LEAVE TO FILE SECOND MOTION FOR REHEARING

Ex Parte Stephen McWilliams, No. 64,508 (Tex. Crim. App., July 14, 1982).

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas, July 14, 1982

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave to File" the Appellant's 2nd Motion for Rehearing in Cause No. 64,508 EX PARTE:

STEPHEN A. McWILLIAMS

vs.

THE STATE OF TEXAS Appellee.

Sincerely yours,

THOMAS LOWE, Clerk

V. PETITION FOR WRIT OF HABEAS CORPUS

V. PETITION FOR WRIT OF HABEAS CORPUS, JANUARY 11, 1979

VIII

Petitioner contends that the court in the instant cases did not have the jurisdiction to rule on the competency of this petitioner to enter a plea of guilty. The learned Trial Judge might have been highly competent to sit as Judge in a court of criminal law, but lacked all obvious training and teachings to rule on the competency of an individual's mental stability, especially of an individual with the type of background this petitioner has, and was based solely, on two short observations in court. By the trial Judge failing to enter a psychiatric report into the record at the time of the guilty plea and merely "Assuming" this petitioner was competent by relying on his own opinion of the doctor as "A good man"; this petitioner was completely denied Due Process and

Fundamental Fairness as warranted by the constitution.

VIV

Petitioner contends that the attorney for the State knowingly and intentionally violated the holding of the "Carving Doctrine" in which the Court of Criminal Appeals has constantly held that, "Prosecutor is not barred from carving as large an offense out of a single transaction as possible - but it may only carve once". This is especially true where three indictments and three separate and distinct charges with three convictions were had in the same court at the same time, and by the same Judge, and with the same attorneys, based on the same evidence, yet arose out of a single act against positive law.

B1.15

VI. FIRST SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

VI. FIRST SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS FOR POST CONVICTION RELIEF

August 8, 1979

1.

In Cause Nos. 10,169, 10,170, and 10,171, Petitioner was convicted of aggravated robbery, aggravated rape, and aggravated kidnapping, respectively. Such offenses grew out of the same transaction and Petitioner's conviction of aggravated rape in Cause No. 10,170 and aggravated kidnapping in Cause No. 10,171 are void because said convictions were barred by the doctrine of former jeopardy.

2.

On July 24, 1975, Petitioner pled guilty to the offenses of aggravated robbery, aggravated rape, and aggravated kidnapping. Petitioner was not admonished of the consequences of his pleas of guilty to the offenses of aggravated rape in Cause No. 10,170 and aggravated kidnapping in Cause No. 10,171. As a consequence,

the judgments of conviction in Cause Nos. 10,170 and 10,171 are void and should be set aside.

Bl.16

VII. SECOND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

VII. SECOND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS FOR POST CONVICTION RELIEF.

November 19, 1979

1.

In Cause Nos. 10,169, 10,170, and 10,171, Stephen A. McWilliams did not enter pleas of guilty which were free and voluntary and uninfluenced by any consideration of fear or by any persuasion because his mental condition and the conditions of his confinement rendered him psychologically incapable of entering pleas which were voluntary and intelligent.

2.

In Cause Nos.10,169, 10,170, and 10,171, Stephen A. McWilliams' sanity was raised as an issue prior to entry of his pleas of guilty and the Court failed to conduct a hearing on his sanity.

VIII. SECOND MOTION FOR REHEARING

VIII. SECOND MOTION FOR REHEARING

Ex Parte Stephen McWilliams, No. 64,508 (Tex. Crim. App.)

Stephen A. McWilliams ("McWilliams"), Applicant, files this his Second Motion for Rehearing with respect to the Opinion on State's Motion for Rehearing delivered May 12, 1982 purporting to deny relief as to the conviction in Cause No. 10,171 (aggravated kidnapping) and with respect to portions of the Opinion delivered by the Court of Criminal Appeals on October 15, 1980 denying relief as to the conviction in Cause No. 10,169 (aggravated robbery) and in support thereof would respectfully show as follows:

Assignments of Error

The Opinion on State's Motion for Rehearing delivered herein on May 12, 1982 with respect to the conviction for aggravated kidnapping in Cause No. 10,171 in the 23rd Judicial Court of Fort Bend County is erroneous in each of the following respects:

FIRST POINT

THE COURT OF CRIMINAL APPEALS ERRED IN PURPORTING TO UPHOLD McWILLIAMS' CONVICTION FOR AGGRAVATED KIDNAPPING BECAUSE THIS CONVICTION VIOLATED THE DOCTRINE AGAINST DOUBLE JEOPARDY IN THE CONSTITUTIONS OF THE UNITED STATES AND TEXAS.

SECOND POINT

THE COURT OF CRIMINAL APPEALS ERRED IN DENYING McWILLIAMS' PETITION FOR WRIT OF HABEAS CORPUS AS TO HIS CONVICTION FOR AGGRAVATED KIDNAPPING AND VIOLATED THE DOCTRINES OF FORMER JEOPARDY, RES JUDICATA, AND COLLATERAL ESTOPPEL BECAUSE THE CONVICTION FOR AGGRAVATED KIDNAPPING WAS SET ASIDE AND PROSECUTION ORDERED DISMISSED ON OCTOBER 15, 1980.

THIRD POINT

THE COURT OF CRIMINAL APPEALS ERRED IN DENYING McWILLIAMS' PETITION FOR WRIT OF HABEAS CORPUS RELIEF AS TO HIS CONVICTION FOR AGGRAVATED KIDNAPPING AND VIOLATED HIS RIGHT TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS UNDER THE CONSTITUTIONS OF THE UNITED STATES AND TEXAS BECAUSE THE COURT REVERSED ITS PRIOR OPINION WITHOUT PROVIDING McWILLIAMS AN OPPORTUNITY FOR A HEARING.

FOURTH POINT

THE COURT OF CRIMINAL APPEALS ERRED IN DENYING McWILLIAMS' PETITION FOR WRIT OF HABEAS CORPUS RELIEF AS TO HIS CONVICTION FOR AGGRAVATED KIDNAPPING BECAUSE THE COURT REJECTED THE CARVING DOCTRINE AND APPLIED ITS NEW RULE OF LAW RETROACTIVELY AND AS AN EX POST FACTO LAW IN VIOLATION OF THE CONSTITUTIONS OF THE UNITED STATES AND TEXAS.

FIFTH POINT

THE COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT DETERRENCE OF CRIME IS A COMPELLING REASON TO REJECT THE CARVING DOCTRINE.

SIXTH POINT

THE COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT THE DOCTRINE OF CARVING IS NOT MANDATED BY THE DOUBLE JEOPARDY CLAUSES OF THE CONSTITUTIONS OF THE UNITED STATES AND TEXAS.

SEVENTH POINT

THE COURT OF CRIMINAL APPEALS ERRED IN REJECTING THE CARVING DOCTRINE BECAUSE IT WAS ALLEGEDLY ONLY APPLIED IN TEXAS.

EIGHTH POINT

THE COURT OF CRIMINAL APPEALS ERRED IN REJECTING THE CARVING DOCTRINE BECAUSE IT HAS BEEN STATED AND APPLIED INCONSISTENTLY IN PRIOR CASES.

NINTH POINT

THE COURT OF CRIMINAL APPEALS ERRED IN REJECTING THE CARVING DOCTRINE ON THE GROUND THAT SUCH WAS THE INTENT OF THE TEXAS LEGISLATURE.

TENTH POINT

THE COURT OF CRIMINAL APPEALS ERRED IN ADOPTING A RULE OF DETERMINING DOUBLE JEOPARDY ON A "SAME OFFENSE" AS OPPOSED TO A "SAME TRANSACTION" BASIS.

The Opinion of the Court of Criminal Appeals delivered herein on October 15, 1980 with respect to the conviction for

aggravated robbery in Cause No. 10,169 in the 23rd Judicial District Court of Fort Bend County is erroneous as set forth below. To the extent that the Opinion on State's Motion for Rehearing reinstates McWilliams' conviction for aggravated kidnapping, it is likewise erroneous for the following reasons previously set forth in McWilliams' Motion for Rehearing as to his conviction for aggravated robbery.

ELEVENTH POINT

THE COURT OF CRIMINAL APPEALS ERRED BECAUSE THE COURT FAILED TO CONSIDER PARAGRAPH 1 OF PETITIONER'S SECOND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS FOR POST CONVICTION RELIEF AND EVIDENCE IN SUPPORT THEREOF WHICH SHOWED THAT McWILLIAMS WAS IN FACT NOT MENTALLY COMPETENT AT THE TIME HE ENTERED HIS GUILTY PLEA.

TWELFTH POINT

THE COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT THERE WAS NO EVIDENCE OFFERED AS TO INEFFECTIVENESS OF COUNSEL AT THE EVIDENTIARY HEARING IN CONNECTION WITH PETITIONER'S APPLICATION BECAUSE McWILLIAMS CLAIMED THAT COUNSEL WAS INEFFECTIVE INTER ALIA FOR FAILING TO OBTAIN PRIOR MEDICAL RECORDS AND COUNSEL STATED ON THE RECORD AT THE GUILTY PLEA HEARING THAT HE DID NOT KNOW WHAT WAS SAID BY PRIOR TREATING PSYCHIATRISTS.

THIRTEENTH POINT

THE COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT THE TRIAL COURT WAS RELIEVED OF ANY RESPONSIBILITY TO HOLD A PRETRIAL HEARING AS TO MENTAL COMPETENCE BY VIRTUE OF McWILLIAMS'S ANNOUNCEMENT OF READY AND ENTRY OF A GUILTY PLEA WITHOUT ANY SUGGESTION OF INCOMPETENCY BECAUSE COMPETENCY IS NON-WAIVABLE.

FOURTEENTH POINT

THE COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT A BONA FIDE DOUBT AS TO McWILLIAMS' MENTAL COMPETENCY WAS NOT RAISED AT THE TIME OF HIS GUILTY PLEA SO AS TO REQUIRE THAT A SEPARATE JURY TRIAL BE HELD TO DETERMINE HIS COMPETENCY.

FIFTEENTH POINT

THE COURT OF CRIMINAL APPEALS ERRED IN THAT IT DID NOT CONSIDER AS EVIDENCE RAISING THE ISSUE OF LACK OF MENTAL COMPETENCY AT THE TIME OF McWILLIAMS' GUILTY PLEA THE STATEMENTS CONTAINED IN A PSYCHIATRIC REPORT ADMITTED INTO EVIDENCE (i) THAT McWILLIAMS HAD ATTEMPTED SUICIDE AND (ii) THAT McWILLIAMS WAS SENT TO A MENTAL HOSPITAL BY A COURT.

SIXTEENTH POINT

THE COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT THERE WAS AN ADEQUATE EXPLANATION OF McWILLIAMS' PREVIOUS ADMISSIONS TO A MENTAL HOSPITAL SUCH AS TO OBVIATE THE NEED OF A SEPARATE TRIAL TO DETERMINE HIS MENTAL COMPETENCY BECAUSE NEITHER McWILLIAMS, HIS COUNSEL, NOR THE EXAMINING PSYCHIATRIST EXPLAINED THOSE HOSPITALIZATIONS TO THE COURT.

SEVENTEENTH POINT

THE COURT OF CRIMINAL APPEALS ERRED IN FAILING TO HOLD THAT McWILLIAMS' PRIOR ADJUDICATION OF MENTAL INCOMPETENCY, WHICH HAD NOT BEEN SET ASIDE, RAISED A PRESUMPTION OF MENTAL INCOMPETENCY.

EIGHTEENTH POINT

THE COURT OF CRIMINAL APPEALS ERRED IN THAT IT DID NOT APPLY THE "NO EVIDENCE" TEST TO DETERMINE THE QUANTUM OF EVIDENCE WHICH WAS NECESSARY TO RAISE THE ISSUE OF LACK OF MENTAL COMPETENCE.

REQUEST FOR ORAL ARGUMENT

Petitioner, Stephen A. McWilliams, respectfully requests the opportunity to present oral argument to this Court of Criminal Appeals in connection with his Second Motion for Rehearing.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Stephen A. McWilliams Petitioner, prays that this Second Motion for Rehearing be granted and that the Court change and revise its Opinion delivered October 15, 1980 and its Opinion on State's Motion for Rehearing delivered May 12, 1982 so as to

correct the errors made by it as herein set forth and dismiss the indictments in Cause No. 10,169 for aggravated robbery and in Cause No. 10,171 for aggravated kidnapping. In the alternative, Petitioner prays that the Court dismiss the indictments in Cause Nos. 10,169 and 10,171, and remand this case for a new trial, or, alternatively, order that a jury trial be had to determine whether McWilliams was mentally competent at the time he entered his guilty pleas in Cause Nos. 10,169 and 10,171 and, if a retroactive determination of competence cannot be made, that a new trial in Cause Nos. 10,169 and 10,171 be held or, alternatively, order a full and complete hearing in connection with this Writ of Habeas Corpus on the question of whether McWilliams was mentally incompetent at the time he entered his guilty pleas in Cause Nos.

10,169 and 10,171 and for such other and further relief to which McWilliams may show himself entitled.

Respectfully submitted,

BUTLER, BINION, RICE, COOK
& KNAPP

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State Bar No. 11362500
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(202) 466-6900

Attorney for
Stephen A. McWilliams

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Second Motion for Rehearing was mailed by certified mail, return receipt requested, to Mr. Robert Huttash, State Prosecuting Attorney P.O. Box 12405, Austin, Texas 78711 and to Ms. Jeanie Kitchens, Assistant District Attorney, Fort Bend County Courthouse, Richmond, Texas 77469 on this 18th day of May, 1982.

ROBERT L. KETCHAND

B1.19

CERTIFICATE OF SERVICE

I, Robert L. Ketchand, the attorney for the Petitioner, herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 13th day of September, 1982, served three copies of the foregoing Appendix to Petition for Writ of Certiorari to Mr. Robert Huttash, State Prosecuting Attorney P.O. Box 12405, Austin, Texas 78711 and to Mr. William Meitzen, District Attorney, Fort Bend County Courthouse, Richmond, Texas 77469 by first class United States mail, certified and postage prepaid in accordance with Rule 28.3 of the Rules of the Supreme Court.

ROBERT L. KETCHAND
Counsel of Record for
Petitioner

Office - Supreme Court, U.S.
FILED
NOV 4 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-425

IN THE UNITED STATES SUPREME COURT OCTOBER TERM, 1982

STEPHEN A. McWILLIAMS,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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NO. 82-425

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STEPHEN A. McWILLIAMS,
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V.

THE STATE OF TEXAS,
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ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

PROOF OF SERVICE

I hereby certify that on the 3rd day of November, 1982, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Mr. Robert L. Ketchand, BUTLER, BINION, RICE, COOK & KNAPP, 1100 Esperson Building, Houston, Texas 77002. All parties required to be served have been served. I am a member of the Bar of this Court.

DOUGLAS M. BECKER
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ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO BEFORE ME this ____ day of November, 1982.

NOTARY PUBLIC in and for
Travis County, TEXAS

QUESTIONS PRESENTED

I. WHETHER THE EVIDENCE BEFORE THE TRIAL COURT RAISED DOUBT OF PETITIONER'S COMPETENCY SUFFICIENT TO REQUIRE IT TO CONDUCT A HEARING ON THE ISSUE?

II. WHETHER RETROACTIVE ABANDONMENT OF THE CARVING DOCTRINE BY THE TEXAS COURT OF CRIMINAL APPEALS CONSTITUTED AN EX POST FACTO LAW?

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TO THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES The State of Texas, Respondent herein, by and through her attorney, the Attorney General of Texas, and respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Texas Court of Criminal Appeals in this case.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported as *Ex parte Stephen A. McWilliams,* 634

S.W.2d 815 (Tex.Crim.App. 1982)(*en banc*), and is reproduced in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks review by certiorari of a judgment of the Texas Court of Criminal Appeals entered May 12, 1982, in appellate cause No. 64508 denying in part Petitioner's application for writ of habeas corpus. Petitioner's application for rehearing was denied on July 14, 1982. The petition for writ of certiorari was filed on September 13, 1982. Jurisdiction is proper under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, §10, cl. 1:

> No State shall . . . pass any ex post facto law . . .

U.S. Const. amend. XIV, §1:

> . . . nor shall any State deprive any person of life, liberty or property, without due process of law . . .

STATEMENT OF THE CASE

A. *Statement of Proceedings Below*

Respondent has lawful and valid custody of Petitioner pursuant to the judgments and sentences of the 23rd Judicial District Court of Fort Bend County, Texas, in Cause Nos. 10169 (aggravated robbery) (Tr. 4,5), and 10171 (aggravated kidnapping)(Tr. 4,5). On July 24, 1975, Petitioner, represented by competent counsel, voluntarily and knowingly waived his right to trial by jury and pleaded guilty to aggravated robbery, aggravated rape (cause number 10170), and aggravated

kidnapping. He was sentenced to imprisonment for thirty years on each count, to be served concurrently (Tr. 5). The convictions were not directly appealed.

Petitioner filed an application for a writ of habeas corpus in the trial court in 1979, alleging, among other grounds, that the trial court lacked jurisdiction to determine his competency to stand trial, and that his conviction of more than one offense arising out of the same transaction violated the carving doctrine. *See, Herera v. State,* 34 S.W. 943 (Tex.Crim.App. 1896), (Tr. 6,10). Counsel supplemented the petition[1] by alleging that the trial court failed to conduct a sanity hearing after the issue was raised.[2] (Tr. 14). Following a hearing on January 23, 1980, the trial court recommended that relief be granted in part, on the carving issue (Writ SF 28). The Texas Court of Criminal Appeals on original submission granted relief from conviction for aggravated rape, on the basis of a faulty indictment, 634 S.W.2d at 817, and on the conviction for aggravated kidnapping on the basis of a carving violation, *id.,* but upheld the trial court's action in regard to competency. *Id.* at 819-21. Both Petitioner and Respondent requested rehearing. On May 12, 1982, the appellate court granted the state's motion, abandoning the carving doctrine and reinstating Petitioner's conviction for aggravated kidnapping. *Id.* at 822-24. Petitioner's motion for a second rehearing was denied on July 14, 1982. *Id.* at 835. A petition for writ of certiorari to this Court followed.

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1. Although Petitioner includes excerpts from a "First Supplemental Petition for Writ of Habeas Corpus" in his appendix, this pleading is not included in the record.

2. The pleadings were orally amended during the writ hearing to refer to "competency" rather than "sanity." (Writ SF 26-27).

B. *Statement of Facts*

Petitioner robbed a convenience store in Fort Bend County, Texas, at gunpoint on March 20, 1975 (SX 4-8). He then abducted a female employee and took her to a deserted area, where his car stalled (SX 4,6). He forced her to commit sodomy and intercourse. She was able to escape after he fell asleep. *Id.* Petitioner was indicted for aggravated robbery, aggravated rape, and aggravated kidnapping (Tr. 2).

Dr. Benjamin Sher, a professor of psychiatry on the faculty of Baylor University College of Medicine, determined that Petitioner was competent to stand trial, after examining him at the request of the district attorney (SX 9). Dr. Sher's report was provided to the court at Petitioner's hearing on his guilty plea (SF 13). Petitioner responded intelligently to the lengthy examination of the trial court, giving no indication of contemporaneous incompetency (SF 4-35). Defense counsel informed the court that his client had the ability to cooperate in the preparation of the case and that Petitioner was competent (SF 15-16).

At Petitioner's state writ hearing, medical records from institutions in which Petitioner had been hospitalized and an affidavit from a Dr. Lucian T. Jones, who interviewed Petitioner more than four years after his trial, were produced (Writ DX 2-8). The Jones affidavit, which was not admitted at the hearing, opined that Petitioner had been incompetent during the criminal proceedings.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE EVIDENCE BEFORE THE TRIAL COURT DID NOT RAISE SUFFICIENT

DOUBT OF PETITIONER'S COMPETENCY TO REQUIRE IT TO CONDUCT A HEARING ON THE ISSUE.

The due process clause of the Fourteenth Amendment requires that, if raised by the evidence, the issue of competency to stand trial must be determined in a separate hearing apart from that held to determine guilt or innocence.[3] *Pate v. Robinson*, 383 U.S. 375 (1966); *see also, Drope v. Missouri*, 420 U.S. 162 (1975); *Pedrero v. Wainwright*, 590 F.2d 1383 (5th Cir. 1979). To trigger this duty, the evidence of incompetency must be such as to raise a *reasonable doubt* of Petitioner's incompetency in the mind of the trial court. *Grissom v. Wainwright*, 494 F.2d 30 (5th Cir. 1974). The court must have a reasonable doubt as to whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or whether he has a rational, as well as factual, understanding of the proceedings against him. *Dusky v. United States*, 362 U.S. 402 (1960). This reasonable doubt must be raised by clear and convincing evidence. *Zapata v. Estelle*, 585 F.2d 750 (5th Cir. 1978)(*en banc*). Whether a competency hearing was mandated under the circumstances is addressed to the sound discretion of the trial court and will not be disturbed absent a demonstration that such discretion was abused. *Nathaniel v. Estelle*, 493 F.2d 794 (5th Cir. 1974). The mere presence of mental illness or other mental disability when an accused enters a plea of guilty does not trigger the necessity for a *Pate* hearing. *See, Bolius v. Wainwright*, 597 F.2d 986 (5th Cir. 1979). The trial court must be aware of a mental illness in a criminal defendant that is so debilitating that he is unable to consult with his lawyer and to understand the proceeding factually and rationally. *Id.*

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3. Petitioner does not here allege that he was in fact incompetent to stand trial. *See, Pate v. Robinson*, 383 U.S. 375 (1966).

Petitioner has not shown this. Although here the trial court was aware that Petitioner had previously been hospitalized for his mental problems, there was no evidence that Petitioner had any difficulty functioning outside institutional walls in the two and one-half years since he had left a New York institution, up until the conduct that led to his prosecution. (*See* SF 14). Experts and lay persons were in agreement that Petitioner was able to communicate with counsel and to comprehend the proceedings (SF 15-16, SX 9). Lay testimony is admissible to determine competence. *Bolius v. Wainwright, supra.* The trial court did not have before it the evidence presented at the writ hearing that (1) Petitioner had, more than three years before his prosecution, been deemed to be incompetent, and that (2) a professional who examined Petitioner four years after his trial deemed him to be incompetent, both during his guilty plea hearing and during his 1979 examination. *(See,* Writ DX 3,6). The trial court carefully questioned Petitioner as to his understanding of the proceedings and his psychiatric and institutional history, concluding after examination of a professional report and consultation with defense counsel that Petitioner was then competent (SF 4-16). The Fourteenth Amendment does not require a court to call in numerous experts until an evidentiary conflict is created, or to foresee future findings of incompetency. Based on the evidence before it, the trial court did not entertain the "real, substantial and legitimate doubt" of competency which is required for a *Pate* violation to be triggered. *See, Van Poyck v. Wainwright,* 595 F.2d 1083 (5th Cir. 1979); *Fitch v. Estelle,* 587 F.2d 773 (5th Cir. 1979); *Grissom v. Wainwright,* 494 F.2d 30 (5th Cir. 1974); *Bruce v. Estelle,* 483 F.2d 1031 (5th Cir. 1973); *Jackson v. Caldwell,* 461 F.2d 682 (5th Cir. 1972).

II.

THE WRIT SHOULD BE DENIED BECAUSE NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

The petition for writ of certiorari does not raise unsettled questions of law. The issues addressed concern nothing more than the manner in which well established principles of law should be applied to a unique factual situation. The state appellate court below carefully considered Petitioner's contentions before rejecting them. Even if this Court agrees with Petitoner's conclusion that a *Pate* hearing was called for, such a complaint is not a subject worthy of Supreme Court review. Petitioner has made no showing of widespread practice in Texas of misapplying this Court's pronouncements in regard to the requirement for holding competency hearings *sua sponte*. It is well established that this Court sits to decide important, novel, or recurring questions, not to correct alleged error or injustices in particular cases. This case represents nothing more than a trial court exercising its sound discretion as to a matter that this Court has recognized to be a subject of judicial control. The case here turns on its own facts, and it is not dependent on the deciding of any far-reaching federal questions. Although Petitioner introduced evidence of his mental illness not available to the court at trial, such is largely irrelevant because of its nondisclosure to the trial court at the crucial moment. The issue raised is whether the trial court abused its discretion in declining to conduct a more thorough hearing into Petitioner's competency, based on the evidence before it, *Pate v. Robinson, supra*, not based on evidence that may subsequently have been brought to its attention. The factual allegations are very similar to those raised in *Van Poyck v. Wainwright*, 595 F.2d 1083 (5th Cir. 1979). This case does not present a substantial federal question worthy of this Court's review.

III.

THE RETROACTIVE ABANDONMENT OF THE CARVING DOCTRINE BY THE TEXAS COURT OF CRIMINAL APPEALS DID NOT CONSTITUTE AN EX POST FACTO LAW.

An ex post facto law operates to punish conduct that, although lawful when done, has since become illegal through judicial or legislative action. *Garner v. Board of Public Works of City of Los Angeles,* 341 U.S. 716 (1951). An *unforeseeable* judicial enlargement of a criminal statute, applied retroactively, operates like an ex post facto law. *Marks v. United States,* 430 U.S. 188 (1977). The carving doctrine specified that, when more than one offense is committed in the course of a single continuous transaction, only one conviction could validly be obtained. *Herera v. State, supra.* It was not synonymous with the constitutional prohibition against double jeopardy, although it has been construed to be based in that provision. *Tatum v. State,* 534 S.W.2d 678 (Tex.Crim.App. 1976). Multiple prosecutions may be obtained in accordance with double jeopardy clause of the federal constitution, yet be violative of the carving doctrine. *See, Ex parte McWilliams, supra,* 634 S.W.2d at 822. The doctrine is merely a product of judicial construction which has been of difficult applicability. *Id.* at 822-24. It does not affect the amount of punishment imposed as a result of conviction of a criminal offense. Its abandonment is clearly not an ex post facto law.

When Petitioner was convicted of aggravated robbery, he was subject to imprisonment for five to ninety-nine years or life, a fine not exceeding ten thousand dollars, or both. Tex. Penal Code §§12.32, 29.03(b). He was subject to the same penalty upon conviction of aggravated kidnapping. Tex. Penal Code §§12.32, 20.04(b). Petitioner was sentenced to concurrent thirty-year sentences in each cause (Tr. 5). The decision of the Court of Criminal Appeals did not render any conduct

criminal that was lawful when committed. The applicable punishment range was not altered by the abandonment of the carving doctrine. The punishment was not altered; the only change is in the number of permissible convictions arising from one transaction. No ex post facto violation occurs when a change in the law is merely procedural and does not increase the punishment or alter the elements of the offense. *Weaver v. Graham*, _U.S. __, 101 S.Ct. 960 (1981); *Donald v. Jones*, 445 F.2d 601 (5th Cir.), *cert. denied*, 404 U.S. 992 (1971). A habeas corpus petitioner had no inherent right to be sentenced under the particular provisions in effect when he was indicted. *Breest v. Helgemoe*, 579 F.2d 95 (1st Cir), *cert. denied*, 439 U.S. 933 (1978).

Here the abandonment of the Texas carving doctrine was not unforeseeable. The State has requested the same in its motion for rehearing, and the concept had been severely criticized by commentators, *see* Steele, *A Review of the Jeopardy Defense in Texas*, 16 Tex. Tech. L. Rev. 393 (1981); Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 Yale L.J. 503 (1949); and by members of the court itself. *See, Orosco v. State*, 590 S.W.2d 121 (Tex.Crim.App. 1979)(dissenting opinion on denial of State's motion for rehearing, J. Douglas). Using some of the numerous tests previously enunciated concerning carving, Petitioner's convictions for aggravated robbery and aggravated kidnapping could be allowed to stand, since the robbery was completed before the kidnapping commenced, *see*, SX 4,6; *Humphreys v. State*, 565 S.W.2d 59 (Tex.Crim.App. 1978), and because different evidence is required for each conviction, *id.; Ex parte Calderon*, 508 S.W.2d 360 (Tex.Crim.App. 1974). *Cf. Ex parte Evans*, 530 S.W.2d 589 (Tex.Crim.App. 1975)(whether both offenses are closely related crimes); *Ex parte Caldwell*, 537 S.W.2d 265 (Tex.Crim.App. 1976)(whether the offenses arose out of the smae transaction at the same time and place); *Ellis v. State*, 502 S.W.2d 146 (Tex.Crim.App.

1973)(whether the offenses are both violations of the same statute); and *Hancock v. State*, 495 S.W.2d 222 (Tex.Crim.App. 1973)(whether the indictments were returned on the same dates and listed identical named witnesses). Because of the inconsistent manner in which the doctrine has been applied by the courts, Petitioner, at the time he committed his offenses had no reasonable certain expectation that only one conviction could be carved from the events comprising the crime spree. *Humphreys v. State, supra; Ex parte Calderon, supra.* Since Petitioner is not subject to punishment for an act that was lawful when committed and he is not subject to an unforeseeable retroactive judicial enlargement of a criminal statute, the abandonment of the carving doctrine does not operate as an ex post facto law in its application to Petitioner.

CONCLUSION

For the reasons above stated, Petitioner has failed to present facts indicating that a review of his contentions is needed; therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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